130-320

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 197.

HENRY AMY AND GUSTAVUS HOPPENSTEDT, PLAINTIFFS IN ERROR,

vs.

THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

RECORD FILED NOVEMBER 9, 1885.
AGREED RECORD FILED OCTOBER 20, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 20, 1888.

1 *Stipulation.*

In the Supreme Court of the United States.

HENRY AMY and GUSTAVUS HOPPENSTEDT, Plaintiffs in Error,
vs.
CITY OF WATERTOWN, Defendant in Error. } Original No. 197.

It is stipulated by and between the parties to the above cause that the clerk of this Court need not print the whole record, but shall print in lieu thereof the following abstract, which is hereby stipulated to be a true and correct abstract of the record, and to contain what is necessary to be considered on the hearing of this case.

FINCHES, LYNDE AND MILLER,
Attorneys for Plaintiffs in Error.
DANIEL HALL,
Attorney for Defendant in Error.

2 Supreme Court of the United States.

HENRY AMY and GUSTAVUS HOPPENSTEDT, Plaintiffs in Error,

vs.

CITY OF WATERTOWN, Defendant in Error.

On the 19th of June, 1883, a bond was filed and a præcipe for summons was filed in the suit of Henry Amy and Gustavus Hoppenstedt, as plaintiffs, against The City of Watertown. The præcipe is as follows:

Præcipe for Summons.

The clerk will issue summons for money demand for the sum of four thousand two hundred dollars, together with interest on $3,000.00 of that sum from and since January 1st, 1877, at seven per cent. per annum, and also with interest on $120 thereof from and since January 1st, 1872, at seven (7) per cent. per annum, and also with interest on one hundred and twenty dollars ($120) thereof from and since July 1st, 1872, at seven per cent. per annum, and also with interest on one hundred and twenty dollars ($120) thereof from and since January 1st, 1873, at seven per cent. per annum, and also with interest on one hundred and twenty dollars ($120) thereof from nd since July 1st, 1873, at seven per cent. per annum, and so with interest on one hundred and twenty dollars ($120) ereof from and since January 1st, 1874, at seven per cent. per nnum, and also with interest on one hundred and twenty dollars 120) thereof from and since July 1st, 1874, at seven per cent. per annum, and also with interest on one hundred and twenty dollars

($120) thereof from and since January 1st, 1875, at seven per cent. per annum, and also with interest on one hundred twenty dollars ($120) thereof from and since July 1st, 1875, at seven per cent. per annum, and also with interest on one hundred twenty dollars ($120) thereof from and since January 1st, 1876, at seven per cent. per annum, and also with interest on one hundred and twenty dollars ($120) thereof from and since July 1st, 1876, at seven per cent. per annum, together with costs and disbursements, and make the same returnable in accordance with law.

FINCHES, LYNDE AND MILLER,
Plaintiffs' Attorneys.

P. O. address, 102 Wisconsin street, Milwaukee, Wis.

On the same day summons was issued in the following form:

3 *Summons.*

The President of the United States of America to said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which will be filed in the office of the clerk of this court at the city of Madison; and you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 19th day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundredth and seventh.

F. M. STEWART, *Clerk.*

FINCHES, LYNDE & MILLER,
Plaintiffs' Attorneys.

P. O. address, 102 Wisconsin street, Milwaukee, Wis.

The marshal served the same and made the following return of service:

Marshal's Return of Service.

Served the within summons on the City of Watertown by delivering a copy thereof to Henry Bieber, city clerk, and also a copy thereof to Chas. H. Gardner, city attorney, and also a copy thereof on Fred. Kusel, the last elected chairman of the board of street commissioners of said city, this 26th day of June, 1883, the office of

mayor of said city being vacant and there being no president of the common council nor presiding officer thereof in office.

F. W. OAKLEY, *Marshal*,
By W. S. MAIN, *Deputy*.

Notice of Appearance.

Please take notice that we are retained by and appear for the defendant, The City of Watertown, in the above-entitled action, and we demand that a copy of the plaintiffs' complaint therein be served upon us, at the office of Hall & Skinner, in the 4th ward of the city of Watertown, Jefferson Co., Wisconsin.

Yours, &c.,
GEO. W. BIRD AND
DANIEL HALL,
Attorneys for Defendant.

P. O. address, Watertown, Wis.

Dated Watertown, Wis., July 14th, 1883.

To Mess. Finches, Lynde & Miller, attorneys for plaintiffs.

Endorsed: Due service of the within notice and demand admitted this 16th day of July, A. D. 1883. Finches, Lynde & Miller, plaintiffs' attorneys.

4 The following complaint was filed on the 25th day of July, A. D. 1883, of which the following is an abstract:

Abstract of Complaint.

Henry Amy and Gustavus Hoppenstedt, the two plaintiffs above named, complaining of the City of Watertown, the above-named defendant, respectfully show to the court and allege as follows, to wit:

First. That they, the said plaintiffs, were at all the times hereinafter mentioned and still are copartners in trade, doing business under the firm name and style of H. Amy and Co., and that each of said plaintiffs was at all the times hereinafter mentioned and still is a resident and citizen of the city of New York, State of New York.

Second. That the above-named defendant, The City of Watertown, at the time of the issuing of the obligations hereinafter mentioned was and ever since then has been and now is a corporation municipal, duly created and organized under and by virtue of the laws of the State of Wisconsin and existing in said State and under the laws thereof, and that the same was by the laws of said State duly and fully authorized and empowered to issue the obligations hereinafter set forth and to bind itself thereby.

Third. That said defendant, The City of Watertown, on the first day of June, 1856, made, executed under seal, issued, and delivered in full conformity to law its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

No. 115. UNITED STATES OF AMERICA. $1,000.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Watertown is justly indebted to and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of January, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

This bond is one of a series of two hundred, of the same amount, tenor, and date, issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

In witness whereof the common council of the city of Water-
5 town hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the common council of said city this first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*

(Then follow two other bonds exactly alike, except numbered 40 and 183, respectively.)

Said plaintiffs further allege as a first cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the 1st day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1872, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first

day of January, 1872, which said plaintiffs claim and demand judgment therefor.

(Here follow similar statements of causes of action on exactly like coupons on said three bonds above mentioned for the semi-annual interest due July 1st, 1872, and January 1st, 1873, and each half year thereafter, down to and including July 1st, 1876.)

Said plaintiffs further allege, as a thirty-first cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, on or about the first day of June, 1856, made and executed under its corporate seal, signed by its mayor and countersigned by its clerk, its negotiable bond, No. 115, bearing date on that day, wherein and whereby, for value received, it promised to pay to Wm. B. Hibbard or bearer one thousand dollars at the Bank of North America, in the city of New York, on the first day of January, 1877, together with interest thereon at the rate of 8 per cent.
6 per annum, payable semi-annually on presentation of the interest warrants or coupons hereto annexed; that a true copy of said bond No. 40 is above set out in full.

That said bond was, at about the date thereof, delivered by said defendant to the payee therein named, and the same was afterwards and before the maturity thereof sold for value by said payee in the money market of the country, and that said bond was afterwards sold and delivered by the bearer and owner thereof to the plaintiffs, who are now its lawful holders and owners; that said defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of one thousand dollars, with interest thereupon, at seven per cent., from the 1st day of January, 1877, which said plaintiffs claim and demand judgment therefor.

(Here follow like statements of causes of actions on said other two bonds, Nos. 40 & 183.)

Wherefore plaintiffs demand judgment against said defendant, The City of Watertown, for each bond and coupon separately from the time it became due, with interest, and for the costs and disbursements.

On the 10th of August, 1883, the defendant served and filed the following answer:

Answer.

The answer of the above-named defendant to the plaintiffs' complaint herein, by George W. Bird and Daniel Hall, its attorneys, respectfully shows unto this hon. court:

First. That, answering said complaint and as its first defense thereto and to the whole of said action, the said defendant denies that it has any knowledge or information sufficient to form a belief as to whether the bonds mentioned in the said complaint were, or any or either of them was, before maturity thereof, or at any other time, sold for value or otherwise by the payee named therein, or by any one else, in the money market of the country, or that said bonds were, or any or either of them was, afterwards, or at any time, sold or delivered by the bearer or owner thereof to the plaintiffs, or that the plaintiffs are the owners or holders of said bonds

or interest warrants or coupons mentioned in the said complaint or of any or either of them.

Second. And further answering said complaint, and as a second defense thereto and to the whole thereof, the said defendant alleges and avers that the said several causes of action stated in said complaint did not, nor did any or either of them, accrue within the six years next before the commencement of this said action, and that none of the causes of action alleged in said complaint accrued within six years before the commencement of this action, and that this action was not commenced within the six years after the same accrued, limited by law for the commencement thereof, and is barred by the statute of limitations of the State of Wisconsin.

Wherefore this defendant demands that said action be dismissed and that it may have judgment for costs herein.

DANIEL HALL,
GEO. W. BIRD,
Def't's Attorneys.

7 (This answer was duly verified.)

On the 21st day of August, 1883, plaintiffs served and filed the following amended complaint:

Amended Complaint.

Now come the above-named plaintiffs, by Finches, Lynde & Miller, their attorneys, and amend, as of course, their complaint heretofore served in the above-entitled cause by making the following additions thereto, to wit:

First. After paragraph fifth of said complaint add the following allegations:

Said plaintiffs allege, on information and belief, that the said defendant, The City of Watertown, and the officers, agents, and citizens and residents of said city did, subsequent to the first day of March, A. D. 1873, conspire together and with each other, and ever since have conspired together and with each other, for the purpose and with the preconceived intent and design to defraud these plaintiffs and all other owners and holders of the bonds and coupons to such bonds issued by said city, and to prevent these plaintiffs and the other holders and owners of said bonds and coupons from obtaining the service of process on said city.

Said plaintiffs further allege, on information and belief, that each year since the first day of March, 1873, a mayor of said city was elected, as required by law, but said mayor each year, with the intent and design as aforesaid, qualified as hereinafter mentioned and immediately thereafter placed his resignation in the hands of the city clerk of said city, to be filed by him in case of emergency, and to take effect accordingly.

Said plaintiffs further allege, on information and belief, that each year since the first day of March, 1873, after the mayor and members of the common council had been elected, they and each of them failed to qualify until they had assembled together in a secret place

with locked doors, unknown to the people at large and to these plaintiffs, and with persons on watch to inform them of the approach of any person or persons, and then and there, if unmolested, the mayor and the members of the common council, qualified as required by law, transacted for said defendant city certain necessary business, and thereafter immediately filed with the city clerk of said city their respective resignations, to take effect immediately, and which resignations went immediately into effect.

Said plaintiffs further allege that since the first day of March, 1873, they have employed attorneys and agents for the purpose of ascertaining who was the mayor or acting mayor or chairman of the common council or chairman of the board of street commissioners and for the purpose of having process served on said city; but owing to said conspiracy, as these plaintiffs are informed and believe, since the first day of March, 1873, there has been no mayor of said city except each year for a few hours at such secret and concealed meetings, and the common council of said city, with the said fraudulent intent and design, has failed each year to elect a chairman of said common council, and since said last-mentioned date there has been no person who was acting mayor and no chairman of the board of street commissioners.

8 Said plaintiffs further allege that, notwithstanding they have used due diligence and have hired attorneys and agents for the purpose of having process served on said city, they have been unable to this date to serve or have served the summons in this action on the mayor of said city or on that person who by law should exercise the functions of mayor of said city.

FINCHES, LYNDE & MILLER,
Plaintiffs' Attorneys.

(This amended complaint was duly verified.)

9 The following amended answer, verified December 28, 1883, was duly filed upon January 16th, 1884:

Amended Answer.

The City of Watertown, the defendant above named, by its attorneys, George W. Bird and Daniel Hall, answering the said plaintiffs' amended complaint herein by this its amended answer thereto, alleges and respectfully shows to this hon. court—

First. That this defendant, the said City of Watertown, denies each and every allegation in the said amended complaint contained, except so much and such parts thereof as are hereinafter expressly admitted to be true or otherwise specifically answered.

Second. This defendant admits the residence and citizenship of the parties, the corporate character and authority of the defendant, and the execution and non-payment by it of the bonds and coupons, as alleged in said amended complaint; also that each year since the first day of March, 1873, a mayor of said city was elected, as required by law.

Third. But this the said defendant denies, that it has any knowledge or information sufficient to form a belief as to whether the bonds mentioned in said amended complaint were, or any or either of them was before maturity or at any other time, sold for value or otherwise in the money markets of the country or elsewhere, or as to whether the said bonds were, or any or either of them was afterwards or at any time, sold or delivered by the bearer or owner thereof to the plaintiffs or to either of them, or as to whether they or either of them ever purchased said bonds or either of them or the interest warrants or coupons mentioned in said complaint or any or either of said interest warrants or coupons, or as to whether the plaintiffs are or ever have been the owners or holders of said bonds or of either or any of them or of said coupons or of any or either of them, or as to whether the plaintiffs have employed attorneys or agents for the purpose of ascertaining who was the mayor or acting mayor or chairman of the common council or chairman of the board of street commissioners or for the purpose of having process served on said city.

Fourth. And this the said defendant alleges, that the above-entitled action was commenced on or about and not before the 19th day of June, A. D. 1883, and that, so far from said plaintiffs having difficulty in commencing said action, the summons therein for the commencement thereof on said 19th day of June, 1883, first issued out of said court under the seal thereof, and was thereupon delivered to the marshal of said district to be served upon the defendant, and that on or about the 26th day of June, 1883, the said marshal made the delivery of the copies thereof, as he returned endorsed upon said summons, and which is now on file in this action, as this defendant is informed and believes, and that on the 16th day of July, 1883, this defendant, by its attorneys, duly appeared in said action and fully submitted itself thereafter to the jurisdiction of this court therein; and this defendant further avers upon information and belief that said plaintiffs never until said 19th day of June, A. D. 1883, attempted to commence the said action or used any diligence whatever to commence the same before said 19th day of June, A. D. 1883.

Fifth. And this the said defendant, for a further and separate defense, which it will insist upon to said action and to the whole thereof and to each and every cause of action set forth in said amended complaint, avers and alleges that neither the said action nor any of the causes of action in the said amended complaint stated nor any part thereof accrued within six years before the commencement of the said above-entitled action nor within six years before said 19th day of June, A. D. 1883, and that said action was not commenced nor attempted to be commenced before said 19th day of June, 1883, and that the said action was not commenced within the six years limited by law for the commencement thereof after the same accrued, and is barred by the statute of limitations of the State of Wisconsin; that as to all the bonds, interest warrants, and coupons described in said amended complaint and as to each and every one of said bonds, interest warrants, and coupons the said de-

fendant saith and avers that each and all of said several causes of action in said amended complaint stated did not, nor did any or either of them, accrue thereon within the six years next before the commencement of said action, and that the said action and the whole and each and every part thereof is barred by the statute of limitations of the State of Wisconsin.

GEO. W. BIRD & DANIEL HALL,
Def't's Attorneys.

Plaintiffs thereupon demurred to defendant's defense of the statute of limitations; which demurrer is as follows:

Demurrer to Defense.

Now come the above-named plaintiffs, by Finches, Lynde and Miller, their attorneys, and demur to the second defense in the defendant's amended answer contained, to wit, to the defense of the statute of limitations, for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a defense.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiffs.

11 The demurrer to the defense coming on to be heard on August 26th, 1884, the court made the following decision:

Decision of Court.

BUNN, *J.:*

This is an action brought upon three several bonds and interest coupons issued by the city of Watertown, June 1, 1856, to the Milwaukee and Madison Railroad Company. The bonds became due January 1, 1877, and the summons was issued on June 19, 1883. To avoid the plea of the statute of limitations, which would otherwise appear upon the face of the complaint to have run upon the bonds and coupons, the plaintiffs set out at considerable length facts which it will not be necessary to recite here in detail, but which are intended to show that the plaintiffs have been prevented from bringing their action sooner by the fraudulent action of the officers of the defendant city, and especially of the mayor and common council in assembling together after their election in each year and transacting some necessary business for the city, in a secret place with closed doors, unknown to the plaintiffs and the people at large, and with persons on watch to inform them of the approach of any person and then filing their resignations, which by law took effect immediately. In brief, that the plaintiffs have used due diligence to obtain service of the summons, but have been prevented by the fraudulent acts of the officers of the defendant city.

The defendant denies these allegations and as a separate defense sets up the statute of limitations, to which plea the plaintiffs demur; and the question is whether these facts take the case out from the operation of the statute.

The limitation applicable to the case is found in sec. 1, chap. 53 General Laws of Wis. for 1872, which is as follows: "No actio brought to recover any sum of money on any bond, coupon, interes warrant, agreement, or promise in writing made or issued by an town, county, city, or village, or upon any installment of the prin cipal or interest thereof, shall be maintained in any court unles such action shall be commenced within six years from the tim when such sum of money has or shall become due." * * *

There are several exceptions to the operation of the statute con tained in the laws of Wisconsin, as—

1st. When the defendant is out of the State.

2d. When defendant is an alien subject or a citizen of a countr at war with the United States.

3d. When the person entitled to bring the action is insane o under age or imprisoned on a criminal charge.

4th. When the commencement of an action has been stayed b injunction or statutory prohibition.

It is also provided that where the action is for relief on the ground of fraud the cause of action shall not be deemed to have accrue until the discovery by the aggrieved party of the facts constituting the fraud.

It is not claimed that the exception to the statute relied upon b the plaintiffs in this case is found in the statute itself, and the ques tion is whether there are any exceptions not found in th 12 statute that can be recognized by the court.

In examining a great many adjudged cases under simila statutes I find the prevailing ruling to be that, the language o the statute being general, it must receive a general construction Perhaps it would be more logical to say that, the language o the statute being perfectly clear, it is wholly unnecessary to cal in the aid of construction to ascertain its meaning, and that it i the duty of the court to enforce the law as it finds it and not to un dertake to engraft upon it exceptions and conditions that the Legis lature has not seen fit to put into it. The law is clear and intelli gible, and by its express terms applies to all cases not falling in one or other of the excepted cases.

It should therefore be faithfully applied by the courts so as t make the statute, which is one of repose, uniform and certain in its operation, and not made to depend upon some complicated issue o fact or of fraud created by the pleadings foreign to the purposes o the law.

If the court can put one exception into the statute not found there it can more, and no litigant could know with any certainty whether his case would fall within the statute or not; and the duty of the court is rendered all the more certain, if that were necessary by the fact that certain express exceptions are contained in the statute, which is a clear implication against any other exceptions being made.

The inquiry under a plea of the statute of limitations is always properly limited to a few simple topics, as—

1. When did the cause of action arise?

Manifestly, in a case like this, when the bond or coupon fell due and was not paid, though it is claimed by the plaintiffs that it did not arise so long as the plaintiffs were prevented by the action of the defendant's officers from getting service on the mayor.

By the same contention, if the maker of a note should conceal himself for a week after his note fell due, so that summons could not be served upon him, the cause of action would not arise until he should come out from his hiding place, so that service could be had.

Nobody is capable of maintaining such a proposition.

2. How long a period has elapsed from the time the cause of action arose to the time when suit was commenced?

By limiting the inquiry to these simple questions, which was, no doubt, the intention of the Legislature, the application & operation of the statute is made certain and uniform and its effects salutary.

See the following cases:

Dupleix *vs.* De Koven, 2 Verm., 540.
Hall *vs.* Weybourn, 2 Salkeeds, 420.
Beckford *vs.* Wade, 17 Vesey, 87.
Hunter *vs.* Howard, 4 Moore, 508.
The Imperial Gas-Light and Coke Company *vs.* The London Gas-Light Co., 18 Jurist, 497.
Same Case, Q. C. L. Rep., 1230.
McIver *vs.* Ragan, 2 Wheaton, 25.
The Bank of the State of Alabama *vs.* Dalton, 9 Howard, 522.
13 Bowman *et al. vs.* Walters, 1 Howard, 189.
Kendall *vs.* United States, 107 U. S., 123.
Wood *vs.* Carpenter, 101 U. S., 135.
National Bank *vs.* Carpenter, *id.*, 567.
Andreae *vs.* Redfield, 98 U. S., 225.
Leffingwell *vs.* Warren, 2 Black, 599.
Gaines *vs.* Miller, 111 U. S., 395.
Fisher *vs.* Harnden, Paine C. C., 61.
United States *vs.* Millard, 4 Benedict, 459.
United States *vs.* Mullenbrink, 1 Woods, 569.
Coke *vs* McGinnis, Morton & Gertzer, 361.
Peck *vs.* Buch, 59 Penn., 71.
York *vs.* Bright, 4 Humph. (Tenn.)
Stiles *vs.* Berry, 1 Hill (S. C.), 296.
Hawell *vs.* Hair, 15 Ala., 194.
Arrowsmith *vs.* Durrell, 21 La. Arm., 295.
Yale *vs.* Randle, 23 La. Arm., 295.
Somerset Co. *vs.* Neghti, 44 N. J. L., 509.
Coleman *vs.* Willi, 46 Mo., 236.
Collis *vs.* Woddy, 2 Mumford, 511.
Conner *vs.* Goodman, 104 Ill., 365.
State Bank *vs.* Morris, 13 Ark., 291.
Fee *vs.* Fee, 10 Ohio, 469.
Favorite *vs.* Booheis, 17 Ohio State, 548.
Smith *vs.* Bishop, 9 Vt., 110.
Peoria M. & F. Ins. Co. *vs.* Hall, 12 Mich., 202.

Traup *vs.* Executors of Smith, 20 Johns, 23.
Leonard *vs.* Pitney, 5 Wend., 30.
Demarest *vs.* Wyncoop, 3 Johns' Chan., 129.
Sacia *vs.* De Gref, 1 Cow., 356.
Bucklin *vs.* Ford, 5 Barbour, 493.
Woodbury *vs.* Shackelford, 19 Wis., 55.
Lindsay *vs.* Fay, 28 Wis., 177.
Eckling *vs.* Simmons, 28 Wis., 272.

The plea of the statute of limitations is held good and the demurrer to it overruled. The plaintiffs will be allowed twenty days in which to file such new or further pleadings as they may be advised is proper, or, in default thereof, judgment will go for the defendant.

Madison, Wis., August 26, 1884.

14 Thereafter attorneys for the defendant gave the following notice to plaintiffs' attorneys:

Motion for Judgment.

Please to take notice that upon the foregoing affidavit and the papers, pleadings, and proceedings on file herein, and upon the records, books, and files herein of the clerk of this court, we shall apply to said court, at the United States court-room, in the city of Madison, Wisconsin, on the 2nd day of December, 1884, at the opening of court on that day, or as soon thereafter as counsel can be heard, for judgment in favor of the defendant and against the plaintiffs herein.

Yours, &c.,

GEO. W. BIRD, &
D. HALL,
Att'ys for Defendant.

Dated November 14, 1884.

The following is the affidavit referred to:

George W. Bird, being duly sworn, doth depose and say that he is one of the attorneys for the defendant in the above-entitled action; that on the 26th day of August, 1884, the plaintiffs' demurrer to the defendant's plea of the statute of limitations herein was overruled by this court and the plaintiffs allowed twenty days in which to file such new or further pleading as they might be advised would be proper, and in default thereof judgment was ordered to go for the defendant; that no new or further pleading has been filed herein or served upon said defendant's attorneys or either of them, except that an amended complaint was served September 11th, 1884, and withdrawn September 15th, 1884, and the said plaintiffs are now in default herein for not filing or serving a new or further pleading.

GEO. W. BIRD.

Subscribed and sworn to November 13, 1884.

Thereupon, on the 2nd day of December, 1884, the following judgment was entered in favor of defendant against plaintiffs:

Judgment.

A copy of the summons in the above-entitled action having been delivered by the marshal on the 26th day of June, 1883, to the city clerk, city attorney, and the last elected chairman of the board of street commissioners of the defendant city, and the defendant having on the 16th day of July, 1883, served on plaintiffs' attorneys a written notice of appearance and demand of the copy of the complaint, and having then and thereby duly appeared, by its attorneys, George W. Bird and Daniel Hall, and the plaintiffs having thereafter duly served and filed their complaint, and the defendant having thereafter duly served and filed its answer to said complaint, pleading, among other things, that this action was not commenced within the six years limited therefor by the statute of limitations of the State of Wisconsin, and is therefore barred by said statute, and the plaintiffs having thereafter duly served and filed an amendment to their said complaint, wherein they allege certain facts in avoidance of defendant's said plea of the statute of limitations, and the defendant having thereafter duly served and filed its amended answer to plaintiffs' complaint as thus amended, wherein defendant pleads, among other things, that this action was not commenced within the six years limited therefor by the statute of limitations of the State of Wisconsin, and was, therefore, barred by said statute, and the plaintiffs having thereafter duly served and filed their demurrer to the defendant's said plea of the statute of limitations contained in its said amended answer on the ground that said plea did not state facts sufficient to constitute a defense, and the issue thus joined by said demurrer having been duly brought to trial at the June term of this court for the year 1884, and having been then tried by the court without a jury, and the court having then found and decided said issue in favor of the defendant, and having overruled plaintiffs' said demurrer and allowed them twenty days in which to file such new or further pleading as they might be advised would be proper, and in default thereof ordered judgment to go for the defendant, and the defendant having, on the 19th day of November, 1884, duly served on plaintiffs' attorneys notice of application for judgment, together with an affidavit showing that no new or further pleading had been filed by the plaintiffs, and the said application having duly come on to be heard on the first day of the December term, 1884, of this court, to wit, on the 2nd day of December, 1884, and no one appearing to oppose the same, and it appearing that no new or further pleading has been served or filed by plaintiffs, and that the defendant is entitled to judgment herein upon the said issue of law:

Now, therefore, on motion of George W. Bird and Daniel Hall, attorneys for the defendant, it is adjudged that this action was not commenced within the six years limited by law for the commence-

ment thereof and is barred by the statute of limitations of the State of Wisconsin.

And it is further adjudged that the plaintiffs take nothing by this action, and that the defendant go thereof without day, and that the defendant, The City of Watertown, have and recover of the plaintiffs, Henry Amy and Gustavus Hoppenstedt, the sum of thirty-one dollars and fourteen cents, its costs and disbursements of this action as duly taxed, and that it have execution therefor.

Dated Madison, Wis., this 2nd day of December, A. D. 1884.

By the court:

F. M. STEWART, *Clerk.*

From this judgment this writ of error was taken.

16 [Endorsed:] Supreme Court U. S. 1888, October term. No. 197. Henry Amy *et al.*, pl'ffs in error, *vs.* The City of Watertown. Agreed record.

[Stamped:] Office Supreme Court U. S. Filed Oct. 20, 1888. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED.
JAN 14 1889
JAMES. H. McKENNEY,
CLERK.

Supreme Court of United States.

OCTOBER TERM, 1888.

No. 197.

HENRY AMY AND GUSTAVUS HOPPENSTEDT,
Plaintiffs in Error,

vs.

THE CITY OF WATERTOWN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

GEORGE W. BIRD,
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Attorneys for Defendant in Error.

DEMOCRAT PRINTING COMPANY, PRINTERS, MADISON, WIS.

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STATEMENT OF CASE.

The praecipe was filed and the summons in this action issued June 19, 1883, and copies of the latter delivered to certain city officers, or late officers, June 26, 1883, and defendant duly appeared and demanded copy of the complaint, July 16, 1883.

The complaint, filed July 25, 1883, contains thirty-three separate causes of action, thirty of which are upon thirty coupons of $40 each, attached to three bonds issued by the city, June 1, 1856, to aid in the construction of the Watertown & Madison Railroad, and the other three are upon the three bonds.

The first of the thirty coupons became due January 1st, 1872, and the last July 1, 1876, and the three bonds became due, each of them, January 1, 1877.

Defendant's answer, duly filed and served August 10, 1883, pleads among other defenses not necessary to detail here, the six years statute of limitations of Wisconsin. On August 21, 1883, and within the time allowed by the Wisconsin statute for amending pleadings as of course (Sec. 2685, R. S. 1878), plaintiffs served and filed an amendment to their complaint, wherein certain allegations are made upon information and belief to avoid the plea of the statute of limitations.

The amendment contains—

First. A general allegation, that since March 1, 1873, defendant, its officers, agents, citizens and residents, have conspired together for the purpose and with the preconceived intent and design to defraud the plaintiffs and all other owners of its bonds and coupons, and to prevent the plaintiffs and such other owners from obtaining the service of process.

Second. The specific allegation that each year since March 1, 1873, a mayor of said city has been duly elected but, with such intent and design, said mayor each year qualified and immediately thereafter placed his resignation in the hands of the city clerk, to be filed by him in case of emergency, and to take effect accordingly.

Third. That the mayor and aldermen, each year since March 1, 1873, failed to qualify until they had assembled together in a secret place, with locked doors, unknown to the people at large and to plaintiffs, and with persons on watch to inform them of the approach of any person or persons, and then and there if unmolested, duly qualified, transacted certain necessary business for the defendant, and immediately thereafter filed with the city clerk their resignations, which took effect immediately.

Fourth. That since March 1, 1873, plaintiffs have employed attorneys and agents for the purpose of ascertaining who was the mayor, acting mayor, chairman of the council, or chairman of the board of street commissioners, and for the purpose of having process served on said city, but owing to said conspiracy since March 1, 1873, there has been no mayor, except each year for a few hours, at such secret and concealed meetings, and the common council, with such fraudulent intent and design, has failed each year to elect a chairman of said common council, and since March 1, 1873, there has been no person who was acting mayor, and no chairman of the board of street commissioners.

Fifth. That nothwithstanding plaintiffs have used due diligence and have hired attorneys and agents for the purpose of having process served on defendant, they have been unable to serve or have served the summons in this action on the mayor of said city, or on that person who by law should exercise the functions of mayor of said city. Pages 6 and 7 of record.

In its amended answer to this amended complaint, duly served and filed, the defendant denies specifically all the allegations of the above amendment to the complaint, and among other defenses, again pleads the statute of limitations (pages 7, 8 and 9 of record), to which plea the plaintiffs demurred "for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a defense," page 9.

The demurrer was overruled August 26, 1884, the decision of court thereon being found on pages 9 to 12 of record, and judgment for defendant accordingly entered December 2nd, 1884, to review which the writ of error herein has issued.

Each of the thirty causes of action upon the coupons set up in the complaint, accrued on or before July 1, 1876, and not later, and each of the three causes of action upon the bonds, accrued January 1, 1877, and not later. This action, even if regarded as commenced at the time of the attempted service of the summons, was not commenced until June 26, 1883, being six years, five months and twenty five days after the latest of the several causes of action set up in the complaint accrued. It is, therefore, an undisputed fact that this action was not commenced within six years after the cause of action accrued, as required by chapter 53, general laws of 1872 of Wisconsin. Hence the action is barred by that statute, unless the facts set up in the amendment to the complaint prevent or suspend the running of the statute. The only question then is do those facts have that effect.

I.

The facts alleged in the amendment to the complaint do not prevent or suspend the running of the statute of limitations.

1. The provisions of the Wisconsin statutes prescribing the limitation in this case, and affecting the question, are as follows:

Section 1, chapter 53, general laws of 1872.

"No action brought to recover any sum of money, on any bond, coupon, interest warrant, agreement or promise in writing, made or issued by any town, county, city or village, or upon any installment of the principal or interest thereof, *shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money has or shall become due*, when the same has been or shall be made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order: provided, that any such action may be brought within one year after this act shall take effect: provided further, that this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing."

Sections 4219, 4222, 4249 and 4984, of the revised statutes of 1878, provide:

"Section 4219. The following actions *must be commenced* within the periods respectively hereinafter prescribed, *after the cause of action has accrued*."

"Section 4222. Within six years:

"1. An action upon a judgment of a court not of record.

"2. An action upon any bond, coupon, interest warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district in this state."

"Section 4249. The periods of limitation, unless otherwise specially prescribed by law, must be computed from the time of the accruing of the right to relief by action, special proceedings, defense, or otherwise as the case requires, to the time when the claim to that relief is actually

interposed by the party as a plaintiff or defendant in the particular action or special proceeding, except that as to a defense, setoff, or counterclaim, the time of the commencement of the plaintiff's action shall be deemed the time when the claim for relief, as to such defense, setoff or counterclaim is interposed."

"Section 4984. In any case when a limitation or period of time prescribed in any act which is hereby repealed, for the acquiring of any right or the barring of any remedy, or for any other purpose, shall have begun to run, and a limitation or period of time for such purpose shall be prescribed in these revised statutes, the limitation or period prescribed by these statutes shall be held to apply only to such rights or remedies as shall accrue subsequently to the time when the same shall take effect; and the act repealed shall be held to continue in force and operative to determine all such limitations and periods of time, which shall have previously begun to run, unless, in special cases in these revised statutes, a different rule shall be prescribed."

The same statutory exceptions to the running of the statute have prevailed in Wisconsin ever since the revision of 1858. They may be found in sections 28 to 35 of that revision as they appear in 2 Taylor's Wisconsin Statutes, 1627, and in sections 4231 to 4238, revised statutes of 1878, and may be briefly summarized as follows:

1. Absence of debtor from the state; not to embrace cases, however, where both parties are non-residents at the time of the accrual of the cause of action.
2. Citizenship of a country at war with the United States.
3. Infancy, insanity or imprisonment on a criminal charge for a less term than for life of the person entitled to bring the action.
4. Death (a) of the person entitled to bring the action, (b) of the person against whom the action may be brought.
5. Reversal of a judgment for plaintiff on appeal the plaintiff may commence a new action within one year after the reversal.
6. When the commencement of an action shall be stayed by injunction or statutory prohibition.

2. The above cited chapter 53 of the laws of 1872, was repealed by the revised statutes which took effect November 1, 1878 (sec. 4978, R. S.). So that under section 4984 R. S. 1878, the law of 1872 continues in force and operative

to determine the limitation of this and all other actions that accrued before November 1st, 1878, while the revised statutes apply only to such actions as accrued after that date.

Mead et al. v. Nelson, 52 Wis., 402.
Kaebler v. Dobberpuhl et al., 56 Wis., 480.
Whitcomb v. Keater, 59 Wis., 609.

Both, however, are substantially the same, the revision being simply a compilation of the former and applying it by section 4984 to this action.

3. This court has already held the act of 1872 valid, and that the actions therein mentioned must be brought within the six years specified, although a longer period had been prescribed by a former statute for the same actions.

Koshkonong v. Burton, 104 U. S., 668.

The act of 1872 is then, a valid act. It is also imperative in its prohibition. "*No action * * shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money has or shall become due*," is its decisive language. It absolutely and positively prohibits *any* action of the kind named being maintained in *any* court after the six years. It provides the action must be commenced within six years from the time the cause of action accrued — not within six years from the time the cause of action accrued, *or after the plaintiff shall be able to get service of process.* The statute not having made the latter provision, the court cannot make it. "To do so," as said by this court in *Leffingwell v Warren*, 2 Black, 599, "would be to usurp the functions of another and distinct department of government. It

would be legislation and not adjudication." Or, as said by the supreme court of Wisconsin, it would be "incorporating into the law, by judicial construction, material provisions which the legislature did not think fit to adopt," and that the court cannot do.

Hanson et al. v. Taylor, 23 Wis, 547.

The legislature for the express purpose, it would seem, of preventing any possible construction that would defer the beginning of the statute's running to a later time than the accrual of the action, provided in section 4249, R. S.: "The periods of limitation, unless otherwise especially provided by law, *must be computed from the time of the accruing of the right to relief by action* * * to the time when the claim to that relief is actually interposed by the party * * in the particular action," etc. After this express legislative declaration, it would seem impossible, for any reason whatever, to defer the commencement of the statute's running to any later period than the accrual of the action.

We submit, therefore, that considering the statute alone, and without the aid of judicial construction, it is apparent that the facts set up in the amended complaint do not prevent the running of the statute. But when we view the statute with the aid of that construction, as we propose now to do, the question would seem to be relieved of all possible doubt.

4. It is a settled principle in the construction of statutes of limitation, that general words are to have a general operation, *and unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. No exception can be*

claimed in favor of particular persons or cases unless they are expressly mentioned.

Angell on Limitations, secs. 194, 476 and 485, *et seq.*
Wood on Limitations, sec. 252, p. 495.

This principle is sustained by an unbroken current of authority, English and American.

In *Dupleix v. DeRaven*, 2 Vern., 540, the plea of the statute of limitations was sought to be defeated by the fact that suit could not have been sooner commenced in the English courts, because defendant, a non-resident, was not sooner within their jurisdiction. But the court held the action barred and say:

"The statute provides where the party plaintiff, he who carries the action about him, goes beyond sea, his right shall be saved; but when the debtor or party defendant goes beyond sea, there is no saving in that case. It is plausable and reasonable that the statute of limitations should not take place, nor the six years be running until the parties came within the cognizance of the laws of England; *but that must be left to the legislature.*"

In *Hall v. Wybourn*, 2 Salkelds, 420, "in bar of the statute of limitations, the plaintiff replied that the defendant was beyond sea, and it was held no plea, for the plaintiff might either file his original or outlaw him; and in one Bynion's case, it was held by BRIDGMAN, C. J., that though the courts of justice were shut up so as no original could be filed, yet this statute would bar this action; *because the statute is general and must work upon all cases which are not exempted by the exception.*"

In *Beckford v. Wade*, 17 Ves., 87, to the plea of the statute of limitations, was replied continuous absence from the Island of Jamaica, wherein the case arose, and it was insisted that inasmuch as suit could not have been sooner commenced by reason of such absence, the statute did not

run. But the court held otherwise, and, in a very full and well considered opinion, say, among other things:

"There is, however, one exception, which, though not contained in the act, it is said, must, on a principle of inherent equity, be constructively introduced into it; that is, an exception in favor of persons out of the Island of Jamaica. * * * It is said, that our statutes of limitation are held to contain such virtual exceptions in favor of persons beyond seas, where it happens not to be positively expressed. I have not been able to find any authority whatever for this doctrine."

* * * * * * * * * * *

"This proposition, that the construction, under the doctrine of inherent equity, is put upon our English statutes of limitation, is, as I apprehend, altogether unfounded. General words in a statute must receive a general construction, and cannot be restrained by arbitrary additions or retrenchment." * * *

"I may also advert to the case of the defendants out of the realm. Before the statute of Queen Anne it was in vain attempted upon general reasoning in many cases, to introduce an exception in favor of the plaintiff in a case where the defendant was out of the realm, a very reasonable exception undoubtedly to be made, but which the statute had not made. A plaintiff out of the realm may prosecute a suit by his attorney, but when the defendant is out of the realm it is very hard to call upon the plaintiff to institute a suit which, in most cases, must be wholly without fruit. Yet, until the statute of Queen Anne was made that case formed no exception, and the statute of limitation barred the action. A very strong case is put, that of the courts of justice being shut up in time of war, so that no original could be sued out; and yet it has been given as the opinion of learned judges that even in that case the statute will continue to run because the statute is general and must work upon all cases which are not exempted by the exceptions. * * * Here is a statute which contains no exception whatever in favor of absentees; we are, therefore of opinion that it is impossible, by construction, to introduce that exception into the law."

Equally direct and positive are the American courts on this question.

In *McIver et al. v. Ragan*, 2 Wheat., 25, being ejectment, the plea of the statute of limitations was sought to be avoided by the fact that plaintiffs were disabled by act of

congress from sooner prosecuting their suit with effect. Held, that did not prevent the statute running; and MARSHALL, C. J., delivering the opinion of the court, says:

"The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended that, as the plaintiffs were disabled, by statute, from surveying their land, and consequently, from prosecuting this suit with effect, they must be excused from bringing it; and are within the equity, though not within the letter of the exception. The claim of the plaintiffs to be excepted from the operation of the act is founded, so far as respects this point, not on the character of the defendant's possession, *but on the impediments to the assertion of their own title.*

"Whenever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add those exceptions. * * If this difficulty (plaintiffs in prosecuting thir suit) be produced by the legislative power, the same power might provide a remedy; *but courts cannot, on that account, insert in the statue of limitations an exception which the statue does not contain.*"

In *The Bank of the State of Alabama v. Dalton*, 9 How., 522, which was an action in Mississippi upon a judgment recovered in Alabama, the defendant pleaded the statute of limitations of Mississippi, which enacted that actions upon judgments obtained in any court outside of that state, should be brought within two years after the passage of the act. To meet this plea, the plaintiff replied that from the rendition of the judgment in Alabama up to the very day process was served, defendant continued to be a citizen and resident of Alabama. The court held the action barred, and say:

"But the argument here is, that the law of Mississippi carries with an exception, for the palpable reason that neither party nor the cause of action was within the operation of the act for a single day before suit was brought.

"1. The act itself makes no exception in favor of a party suing under the circumstances of these plaintiffs. So the supreme court of Mississippi held in the case of *McClintock v. Rogers*, 12 Smedes & Marsh., 702; and this is manifestly true on the face of the act.

2. *The legislaure having made no exception, the court of justice can make none* In the language of this court in *McIver v. Ragan*, 2 Wheat., 29, 'wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to those exceptions.' *This rule is established beyond controversy.*"

In *Kendall v. United States*, 107 U., S. 123, plaintiff's disabilities having been removed by the amnesty proclamation it was urged, in avoidance of the bar of the statute, that it ought not to run while plaintiff was disabled from suing. But the court held otherwise, and say:

"The express words of the statute leave no room for contention. Every claim — except those specially enumerated — is forever barred unless asserted within six years from the time it first accrued. * * The court cannot superadd to those enumerated, a disability arising from the claimant's inability to truthfully take the required oath. It has no more authority to engraft that disability upon the statute, than a disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed."

In *Leffingwell v. Warren*, 2 Black., 599, the invalidity of the tax deed was relied on to prevent the bar of the Wisconsin statute in actions to cover land sold for taxes. The court, after referring to the two exceptions mentioned in the statute, say:

"This case does not fall within either of the exceptions. We have no power to add to them. To do so would be to usurp the function of another and distinct department of government. It would be legislation and not adjudication.

In *Fisher v. Harnden*, Paine (C. C.), 61, Mr. Justice LIVINGSTON said:

"The court disclaims the right or inclination to put on statutes of limitation, which are found to be the most beneficial to be found in our books, any other construction than their words import. It is as much a duty to give effect to laws of this description, with which courts, however, sometimes take great liberties, as to any other which the legislature may be disposed to pass. Where the will of the legis-

lature is clearly expressed, it ought to be followed, without regard to consequences; and a construction derived from a consideration of its reasons and spirit should never be resorted to but where the expressions are so ambiguous as to render such mode of interpretation unavoidable."

In *United States v. Muhlenbrink*, 1 Woods, 569, it was held that the fact that no term of the United States court for the northern district of Georgia was held until September 10, 1866, and no clerk of court appointed until that date, did not continue the suspension of the statute under the act of Congress of June 11, 1864, until that time; but that the suspension continued in Georgia only until the president's proclamation of April 2, 1866.

In *The Sam Slick*, 2 Curtis, 480, the court say:

"The clause of the act now in question operates as a limitation of the lien. The libellant insists that even if his case is within the language of the limitation, its peculiar circumstances render it proper for the court to declare that it ought not to be considered as within the meaning of the legislature. *But it is now a well settled doctrine, which has been repeatedly announced and applied, by the Supreme Court of the United States, that however strong the reasons may be, the court cannot engraft on a statute of limitations an exception not made in it; nor declare a right not to be barred, if within the fair meaning of the act of limitation, because it seems the legislature would have excepted it, if it had been anticipated and considered.* 8 Cranc., 72; 2 Wheat., 25; 9 How., 522."

In *Yale v. Randle*, 23 La. Ann., 579, to a plea of the statute in an action on judgment, it was replied that defendant by injunction restrained the execution of the judgment. Held, not good, the court saying:

"It is contended that inasmuch as the execution of the judgment was restrained by an injunction sued out by the defendant, prescription was suspended during the pendency of that suit, under the equitable maxim, '*contra non volentem agere non currit prosecutio.*' A sufficient answer to this is, that prescription is the creature of positive law, which cannot be overruled by a principle of equity. The law is mandatory and courts are bound to obey it."

In *Coleman v. Willi*, 46 Mo., 236, the running of the statute was sought to be defeated on account of the previous absence of the plaintiff from the state. The court held that did not interrupt the running of the statute, and say:

"Absence of the plaintiff from the state, or non-residence, is not enumerated among the exceptions as waiving the running of the statute."

In *State Bank v. Morris*, 13 Ark., 291, the court say:

"The statute which creates the limitation, must also create the exception. We know of no rule of law or decision to the contrary."

Erwin v. Turner, 1 Eng. (Ark.), 14.
Prior et al. v. Ryburn, 16 Ark., 694.

In *Rugland, Admin., etc., v. Anderson et al.*, 30 Minn., 386, action for injury causing death, the statute giving the action required it to be brought within two years after the injury and it was held that the time between death and administration could not be excepted. The court say:

" The right to maintain an action of this kind being given by Gen. St. 1878, chapter 77, section 2, is such as that section gives and no other. It is, therefore, subject to the limitations which that section prescribes, viz.: that it must 'be commenced within two years after the act or omission by which the death was caused. To this limitation the statute makes no exception, and none can be made by construction."

In *Fairbanks and others v. Long and others*, 91 Mo. 629, 499, the statute provided that any person claiming any real estate in the lawful possession of another and which had not been in possession of claimant or one under whom he claims for 30 years, etc., should bring his action within one year or be forever barred.

It was sought to prevent the bar of the statute on the ground of infancy of all but one of the plaintiffs at the time the act went into effect, and the court held that infancy did not prevent the bar of the statute and say:

"As to the remaining contention of counsel for appellants, that at the time the act went into effect, all the plaintiffs except one were laboring under the disability of minority, it is sufficient to say that the statute makes no exceptions; and the settled rule is, in respect to the running of the statute of limitations, that the statute will run against all persons, "and no exception to the statute can be claimed unless it is expressly mentioned in the statute;" and, "where the statute makes no exception, the court can make none on the ground of an inherent equity, or because it may appear to be reasonable that the statute should not run against any party in a given case."

In *Favorite v. Booheis, Admin.*, 17 Ohio St., 548, it was held that in absence of an express exception in the statute, infancy did not prevent the running of the statute, and the court say:

"The general rule in regard to the application of statutes of limitation is, that all persons, whether under disability or not, are barred by them, unless excepted from their operation by a saving clause. General words of a statute are to receive a general construction, and unless there is found in the statute some ground for restraining it, it cannot be restrained."

In *Howell v. Hair*, 15 Ala., 194, plaintiff claimed to have secured title to the property by possession in Georgia for a longer period than that prescribed by statute for its recovery. Defendant sought to avoid the statute by the fact that his intestate was never a resident of that state. The court say:

"In respect to such statutes, *it has been so often decided as to be now indisputably settled, that an exception will not be implied for the purpose of arresting their operation; that unless there can be found in the statute itself some good ground for restraining it, it can not be restricted by arbitrary additions.* This being the law, the residence of defendant's intestate in Alabama, even coupled with his ignorance of where the slave might be found, did not relieve him from the necessity of instituting his action in Georgia within four years after the sale in order to prevent the operation of the statute above cited."

In *Arrowsmith v. Durell et al.*, 21 La. Ann., 295, during the four years the action was pending on appeal in the su-

preme court, the ten years from the rendition of the judgment limited for bringing an action thereon had expired. It was urged the statute could not run while plaintiff was prosecuting his appeal, else it might happen (as in fact it did in that case) that his judgment might outlaw while prosecuting his appeal. But the court say:

"In reply to all this, however forcible it may appear, we have only to say that when a law is clear and free from all ambiguity, the letter of it is not to be disregarded under pretext of pursuing its spirit. * * The statute before us is, in itself, free from ambiguity. It says plainly that all judgments for money shall be prescribed by the lapse of ten years from the rendition thereof, unless revived before they are prescribed, by having citation issued from the court which rendered them."

The case of *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich., 202, illustrates very forcibly the doctrine we contend for. That was an action at law on the policy, which provided the action must be brought within twelve months from the loss. A summons was issued before, and returned *non est inventus* after the twelve months, when an *alias* was issued and served. To the plea that the action was not brought within the twelve months, was replied impossibility to serve process during that time. The court held inasmuch as the twelve months' limitation was a limitation by contract and not by statute, a fundamental condition of it must be that the defendant must keep itself accessible to the service of process; while no such condition is attached to a limitation by statute, and the court say:

"We do not think it necessary to determine the validity of this species of limitations by contract. If valid at all it was valid as *a contract, and not as a statute.* A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay beyond the period fixed, unless such excuse be recognized by the statute itself. But a limitation by contract (if valid) must, upon the principles governing contracts, be more flexible in its nature, and be liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period. * * And the fundamental idea,

the tacit condition upon which *such* a limitation must rest, and without which it cannot be tolerated for a moment, is, that the defendant should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close, to enable the plaintiff to commence his suit against him, by the service of process in the ordinary legal mode."

5. The principle is not at all modified, at least in actions at law, by the fact that the exception sought to be introduced into the statute, is the fraud of the party setting up and relying on the bar.

In *Hunter v. Gibbon*, 1 Hurlstone & Norman, 459, to the plea of the statute, plaintiff replied fraudulent concealment of the action until after the statute had run. Held, replication not good, and POLLOCK, C. B., says:

"It would be highly mischievious and would open the door to a flood of litigation if we decided that this replication could be pleaded. If such had been the meaning of the legislature we should have been bound to obey. But no case has decided that fraud is an answer to every matter that may be set up as a defense. * * * The plaintiff complains of a trespass to his land. The defendant answers that the act was done so long ago that it cannot be called in question in a court of law. To that the plaintiff purposes to reply fraud. The plaintiff's counsel cited one authority to show that where there has been a fraud the statute cannot be set up. If that were so, if a man could reply to a plea of the statute, that his debtor had prevented him from suing by a fraud, the equitable replication would be as common as the promise of payment which people had to prove before Lord Tenderden's Act."

ALDERSON, B., says: "I am of the same opinion. The statute says, that no action, etc., shall be brought except within the time therein expressed and not after, viz., actions on the case and of trespass within six years. *The terms of the enactment are absolute and there is no provision for the case*

where a person is prevented from suing by fraud. Such being the plain meaning of the words, the plaintiff now calls upon us to say, that notwithstanding the statute, a person may maintain an action if prevented by fraud from suing. But it is for the legislature, not for us, to say that."

In *Brown v. Howard*, 4 Moore, 508, action to recover money paid to defendant on his promise to purchase with it a valid annuity for plaintiff, it was alleged defendant fraudulently bought a worthless annuity, and it was sought to avoid the bar of the statute by the fraud of the defendant. The court, however, held the statute a bar, and PARK, J., says:—

"Although this is a case of great hardship on the plaintiff, and I should have been induced to favor him at *nisi prius*, still, I do not see how the court can go outside of the statute, or the cases that have been decided upon it. By the former it has been expressly enacted, that 'all actions of account and upon the case, shall be commenced and sued within six years next after the cause of such action or suit, and not after.' Here the gist of the action is, that the defendant took an improper security. In *Battley v. Faulkner*, Mr. Justice BEST observed, that the only question was, when the cause of action accrued, and he thought the cause of action accrued the moment the defendant failed to perform that which he had agreed to do. That observation appears to me to be well put, and not easily got over."

In *The Imperial Gas Light and Coke Company v. The London Gas Light Co.*, 18 Jurist., 497, it was held that defendant's fraudulent concealment of the cause of action until after the period of limitation had expired, did not avoid the bar of the statute. POLLOCK, C. B., says:—

"On these replications our judgment must be for the defendants. The statute of limitations expressly points out certain cases in which it is *not* to run, i. e., the cases of persons under certain species of incapacity, but it does not make any exception in favor of persons laboring under any other incapacity; *and we cannot graft upon the statute the exception here sought to be grafted on it, namely, where by the fraud of the defendant the plaintiff has been prevented from asserting his rights within the time prescribed by statute.* * * And I believe that if we were

to hold the legislature as having enacted that the statute of limitations should not run whenever the jury are satisfied that a fraud has been practiced to prevent its operation, it would not only give rise to much litigation, but to that which the law abhors, continued litigation. The statute of limitations has been called a statute of repose, but if the construction here contended for by the plaintiffs were to prevail, whenever there was a case of hardship or suggestion of fraud, you would have an action brought though the statute had expired, and have it urged that the matter was for the jury and not for the court."

This case is also reported in 10 *Exch.*, 39, and 2 *C. L. Rep.*, 1230, and in the latter the judgment of the court is announced in these words:—

"PER CURIAM:—Our views of the law is, that there is no mode of escaping from the effects of the statute of limitations by setting up the fraud of the party in whose favor the statute takes effect."

Equally direct and positive are the courts of this country on the subject.

In *Bowman et al. v. Walters et al.*, 1 How., 189, Mr. Justice DANIELS, in delivering the opinion of the court, at page 194, quotes approvingly the statement of LORD REDESDALE in *Hovenden v. Lord Arnnesly*, 2 Sch. & Lef., 636, as follows: "It never can be sound discretion in the court to give relief to a person who has slept upon his rights for such a lapse of time; for though it is said and truly, that the plaintiffs in this suit and those under whom they claim, *were persons embarrassed by the frauds of others*, yet the court cannot act upon such suggestion. If it did, there would be an end of all limitation of actions in the cases of distressed persons."

In *Wood v. Carpenter*, 101 U. S., 135, and *National Bank v Carpenter et al.*, 101 U. S., 567, plaintiffs were induced by the perjury, fraudulent representations and concealment of his property by defendant, to sell their judgments against him for fifty cents on a dollar to a person afterwards discovered to be in defendant's interest, it was held the statute barred the actions, although they arose in Indiana, where,

by statute, fraudulent concealment of the cause of action interrupts the running of the statute.

In *Andreag v. Redfield*, 98 U. S., 225, after citing cases from New York, Vermont, Ohio and South Carolina, the court say, at page 238:

"Without more, it must be conceded that these authorities are sufficient to show what the established rule in the states mentioned is, where the suit is an action at law, and that the fraudulent concealment by the defendant of the plaintiff's cause of action, is not a good answer to the plea of the statute of limitations." At p. 235, the court further say; "State statutes in many cases provide that, where the action proceeds upon the ground of fraud, the lapse of time is to be computed from its discovery; but the courts of New York, as well as several other states, have always held, that the concealment of the cause of action *ex contractu*, does not interrupt or delay the running of the statute as a bar to the action."

In *Gaines v. Miller*, 111 U. S., 395, an equity case arising in Missouri, it was alleged, in avoidance of the statute, that defendant fraudulently absconded and secretly left the state and concealed himself from appellant by traveling to places unknown to her. The court held, inferentially at least, that but for the special statute of Missouri to that effect, these facts would not interrupt the running of the statute in an action at law, and say:

"The only semblance of a fraud is, that Hammond fraudulently absconded and secretly left the state of Missouri, concealing himself by traveling in places unknown to appellant. *But this averment does not relate to the cause of action. It is only made as an excuse for not bringing the suit at an earlier time, and to take the case out of the bar of the statute of limitations.* The law of Missouri, revised statutes, sec. 3243, provides, that if any person, by absconding or concealing himself, prevent the commencement of an action, such action may be commenced within the time limited by the statute, after the commencement of such action shall have ceased to be so prevented. The excuse made by appellant for not sooner bringing her suit was, *therefore*, available in an action at law. * * An action at law was the plain and adequate method for the recovery of the appellant's right. The circuit court, sitting as a court of equity, had, therefore, no jurisdiction of the case."

In *United States v. Maillard*, 4 Benedict, 459, to the plea of the statute of limitations, the plaintiff replied fraudulent concealment of the cause of action. *Held* replication not good, and the court by BLACHFORD, J., said:

"The replications to the plea of the statute of limitations, so far as it relates to all the causes of action, except the three named in the demurrer to such plea, is based on the view, that a fraudulent concealment by the defendant from the plaintiffs, of the acts set forth in such causes of action, until within five years prior to the commencement of the suit, whereby the same was unknown to the plaintiffs until within a period of less than five years next prior to the commencement of the suit, bars the running of the statute. *It is well settled, that, however strong the reason may be, a court cannot engraft on a statute of limitations an exception which the statute itself does not make.* (2 Wheat., 25; 9 How., 522; 2 Curtis, 480.) So, also, the clear weight of authority, at least in the state of New York, is that where the statute does not make fraudulent concealment of the existence of the cause of action an exception to the running of the statute, *the court has no right or power to make such exceptions, either directly, or by the indirect method* of saying that the cause of action does not accrue, in case of a fraudulent concealment until a discovery of the fraud. It is true that Mr. Justice STOREY, in *Sherwood v. Sutton*, 5 Mason, 142–153, dissents from the decision in 20 Johnson, 33. But I cannot but regard the making by the court of an exception in a case of fraudulent concealment, where the statute does not make it, as violating the rule settled by the supreme court, as before stated; especially must this be so, where the statute has, as in the fourth section of the act of 1839, specified, in a proviso, declared exceptions."

The state courts of last resort have announced the same doctrine with almost unvarying uniformity.

In *Coke et al. v. McGinnis*, Martin & Yerger, (Tenn.), 361, to a plea of the statute, in assumpsit for money had and received, the plaintiff replied that defendant received the money as trustee and fraudulently concealed the cause of action Replication overruled and the court, after deciding that the relation of *cestui que trust* and trustee did not prevent the bar of the statute, say:

"Secondly, It is contended that the concealment of the receipt of money by Stone, as set forth in the replication, is a good answer to the plea of the statute of limitations; and that a fraudulent concealment of the cause of action formed an exception in favor of the defendants in error, until they discovered the fraud. Here again it is believed the words of the statute are too plain for construction to afford any aid to the mind not affected by unmeaning refinement: 'The suit shall be brought within three years next after the cause of action,' says the statute. Was the discovery that money had been fraudulently concealed by Stone 'a cause of action.' This it certainly could not be. * * * But it is insisted that the fraudulent concealment put it out of the power of the plaintiffs to sue, and therefore there is an implied exception in their favor, which is equally strong with the express exceptions in favor of those who are infants, *feme coverts*, *non compos*, imprisoned or beyond seas. And this brings us directly to the question whether the courts have power to make exceptions to the affirmative and positive exactions of the statute, in case where the legislature has made none. I am well convinced that this court has no such power; that it is our duty to administer the law, regardless of particular cases of hardship and that it belongs exclusively to the legislature to alter the law, if it is oppressive or inconvenient. It is believed that such has been the course of decision, with slight aberrations, in reference to the act of limitations for centuries."

In *Peck v. Buck et al.*, 59 Tenn., 71, fraudulent concealment of the cause of action and existence of war, were replied to a plea of statute. The court holding the first bad and the second good, say:

"A replication to the plea of the statute of limitations in an action at law, that the defendant had fraudulently concealed the cause of action for the period of time necessary to bar the action, and that the action was begun when said cause of action was discovered, is demurrable. The general principle stated in the case of *Cocke v. McGinnis*, M. & Y., 361, that the courts can make no exceptions to the statute except such as the statute itself has made, has not been departed from in our own courts of law. * * * The court is of the opinion, therefore, that there is no error in the judgment below, allowing the demurrer to the replication of fraud."

In *York v. Bright*, 4 Humph. (Tenn.), the bill charged that complainant was the equitable owner of the land in con-

troversy, and that defendant fraudulently procured a deed to be made to himself by one Johnson, in whom was the legal title. Defendant plead the statute, and showed twenty years' possession under his unrecorded deed from Johnson. Held, the statute was a bar, and the court say:

"The statute of limitations is clearly a bar to this suit. The fact that the defendant procured a deed by fraud, if it were so, and fraudulently obtained possession, would make no difference. *The statute makes no exception for fraud, and will run in favor of a possession and title obtained by fraud.*"

In *Stiles v. Berry*, 1 Hill (S. C.), 296, the defendant secretly and fraudulently obtained possession of a note made by him, and kept it until the statute of limitations had run on it; plaintiff on discovering the fraud brought assumpsit, as on a lost note. Held, that the statute of limitations was a bar, notwithstanding the fraud and although the plaintiff did not know where the note was. The court after quoting the statute, say:

"To ascertain, therefore, whether the plaintiff's action is barred, the most important inquiry is, When did the cause of action accrue? When this is ascertained, the determination whether the statute has once run is a mere matter of numerical calculation which can easily be made. Many of the difficulties in the cases upon the statute of limitation, have arisen from losing sight of the words of the statute, and looking to what appeared to be just and right between the parties. The judges here and elsewhere have, however, set about the work of reform in this respect, and are now endeavoring to conform to the statute. * * The plaintiff's cause of action accrued on the day on which the note became due, and he is, consequently, barred by the statute of limitations, unless the fraud of the defendant will prevent its operation. * * *But unless the discovery of the fraud can be regarded as the plaintiff's cause of action, it cannot have the effect of preventing the operation of the statute of limitations.* For to allow it to have effect in any other point of view *would be to make and allow, by judicial construction, an exception to the statute of limitations, which the legislature did not think proper to make.* The plaintiff's action is on the note, not on the fraud; his cause of action is, that the money, which the defendant on a day certain promised to pay,

is not paid. His right to demand payment arose on the day on which the note fell due — this is his cause of action, and more than four years from its accrual having elapsed before his action was brought, the plaintiff is barred by the statute of limitations."

In *Miller v. Lesser*, 71 Iowa, 147, the Iowa code provided that an action on an unwritten contract must be brought in five years, and not after, "except when otherwise specially declared." The only exceptions declared are contained in section 2530, which provides that in the case of fraud, mistake or trespass the statute shall not run until the discovery of the same. Held that the fact that the debtor had changed his residence from Ohio, where the contract relied on was executed, to Iowa, where the action was brought and lived there under an assumed name, and that the creditor did not know his residence, although he had made diligent inquiry to ascertain it, did not prevent the statute from running.

In *Somerset Co. v. Veghte*, 44 N. J. L., 509, being an action against the county treasurer for moneys as to which he had defaulted, to a plea of the statute, plaintiff replied defendant's fraudulent concealment of his receipt of the money and the cause of action until after the statutory period. The court held:

"1. Courts cannot graft on the statutes of limitations exceptions not contained therein, however inequitable the enforcement of the statute without such exceptions may be.

"2. The fraudulent concealment of a cause of action does not justify the inference of a new promise, which will take the action out of the operation of the statute; nor does it estop the defendant from setting up the bar of the statue at law.

"3. In an action of assumpsit a plea of statute of limitations was interposed. A replication setting up a fraudulent concealment of the cause of action until a time within the statutory limit of six years, and seeking thus to avoid the bar of the statute — held, bad on demurrer."

In *Callis v. Waddy*, 2 Mumford (Va.), 511, action on the case for a deceit, to a plea of the statute plaintiff replied, among other things, that the cause of action is founded on

a *fraud*, and that the same came to plaintiff's knowledge within the time prescribed by law for bringing the action. Held, the replications afforded no answer to the bar of the statute, and the court say:

"This court * * * is of the opinion that the judgment of the said county court is erroneous, in this, that the said court proceeded to render judgment for the defendant in error upon *immaterial* issues joined upon the plea of the act of limitations; the same issues being immaterial, in this, that the matter contained in the replications to the said plea, if admitted and proved to be true, afford no answer to the bar set up by the plea aforesaid."

In *Connor et al. v. Goodman*, 104 Ills., 365, where by statute, fraudulent concealment of the cause of action suspends the statute, it was held fraud other than that named in the statute did not suspend it, and the court say:

"But counsel contend appellants did not learn the fraudulent transaction, whereby they allege they were deprived of their property, until within two years of the filing of their bill, and hence that they were not affected by the statute of limitations. There is no claim made that the cause of action was frudulently concealed from them by Goodman, and so the case is not affected by the 22d section of the limitation act of 1874."

In *Fee v. Fee*, 10 Ohio, 469, to a plea of the statute was replied fraudulent concealment of the cause of action, and a demurrer to the replication was sustained. After referring to the different cases on the subject, the court say. "I agree with the opinion in *Troop v. Smith* (20 John., 33), that, as the statute declares that certain actions shall be commenced within a limited period, the courts of law possess no dispensing power whatever. The law of Ohio, like that of New York, contains a saving in favor of infants, feme coverts, non-residents, and persons non compos, but it does not make fraud one of the exceptions. The true inquiry, therefore, at law, is, when did the cause of action arise, and not, when did knowledge of that fact come to the plaintiff, or by what circumstances was he prevented from obtaining the information."

In *Smith v. Bishop*, 9 Vt., 110, fraudulent concealment of the cause of action was replied to the plea of the statute, and a demurrer to the replication was sustained. The court

after stating that Massachusetts had adopted the doctrine that fraudulent concealment of the cause of action would interrupt the running of the statute, say:

"But the doctrine was subsequently examined by the Supreme Court of New York, and its soundness there distinctly denied. It must be admitted, we think, viewing the doctrine with reference to proceedings at law, that the weight of authority is most decidedly against it. * * * Whether the operation of the statute would be more equitable, if a different criterion were adopted, is a question for legislative consideration. We can neither repeal nor alter the statute."

In *Clark v. Reeder*, 1 Spears (S. C.), 398, fraudulent concealment of the cause of action, held not to suspend the running of the statute.

In the state of New York the principle we contend for here, has been thoroughly established by numerous decisions.

In *Troup v. Executors of Smith*, 20 John., 33, to the plea of the statute was replied fraudulent concealment of the cause of action, and a demurrer to the plea was sustained. SPENCER, C. J., after adverting to what might possibly be the rule in equity, says:

"But the courts of law are expressly bound by the statute, it relates to specified actions, and it declares that such actions shall be commenced and sued within six years next, after the cause of such actions accrued, and not after; thus, not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period. *I know of no dispensing power which courts of law possess arising from any cause whatever;* and it seems to me, that where the legislature, in the same statute, gives an extension of time in the cases of the arrest or reversal of judgment, in cases of infancy, coverture of the *feme*, insanity and imprisonment, and for an absence of the defendant out of the state, when the cause of action accrued, *that it would be an assumption of legislative authority to introduce any other proviso.* The plaintiff's case may be a very hard one; but that affords no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands." (After suggesting the quere whether the replica-

tion shows a fraudulent concealment the opinion proceeds.) "But we wish to be understood, as deciding the case on the ground, that whether there was a fraudulent concealment or not, so as to prevent the plaintiff's discovering the fraud, until within six years before the commencement of the suit, sitting as a court of law, and bound by the express provision of the statutes, *we could not notice the fraud so as to take the case out of the operation of the statute.*"

In *Leonard v. Pitney*, 5 Wend., 30, to a plea of the statute was replied fraudulent concealment of the cause of action, and a demurrer to the replication was sustained. MARCY, J., in the opinion saying:

"I am of opinion that the replications are not a good answer to the pleas of the statute of limitations. By that statute it is enacted, that all actions upon the case should be commenced within six years next after the cause of such actions accrued, and not after. No language can be more explicit. * * * Whether the fraudulent conduct of the defendant, in concealing from the plaintiff a knowledge that a cause of action had accrued to him until the usual time of limitations mentioned in the statute had elapsed, will be an answer to a plea setting up the statute is a question which has, within a few years, been ably discussed in this court, and deliberately settled. In the case of *Troup v. The Executors of Smith*, 20 John, 33, a replication alleging fraudulent concealment of the cause of action from the plaintiff in avoidance of such plea was overruled. All the authorities that were urged in favor of the replication in this case, were considered by the court in that, and answered in a satisfactory manner. That case settled the law which applies to and must govern this case."

In *Allen v. Mills*, 17 Wend., 202, which was trover for the conversion of twenty thousand dollars in bank bills, to a plea of the statute, the plaintiffs replied that "the bills in question were *stolen* from them by some person unknown and secretly kept, and although they used great exertions to discover the bills and the person by whom they were so taken, yet the same proved fruitless until within six years before the commencement of the action, when they first discovered that the bills so secretly and feloniously taken and secretly kept, were afterwards converted by the defendant, he well knowing the bills, at the time of the conversion, to be the prop-

erty of the plaintiffs, and that the same had been secretly and feloniously taken from their possession. The plaintiffs, in their brief, contended that "the defendant admits that he converted the bills with knowledge that they were the property, and had been feloniously taken from the possession of the plaintiffs. It cannot be that the statute of limitations was ever intended to protect a party under such circumstances. The plaintiffs could not sue, until they discovered the person against whom they had a claim, and therefore are not chargeable with sleeping on their rights. Besides, they were kept in ignorance of their right to sue, by the felonious act of the defendant himself keeping secretly the money of the plaintiffs." But the court held the statute a bar, and by NELSON, Ch. J., say:

"The principal question in the case arises upon the plea: that is, whether a fraudulent concealment of the cause of action by the defendant, until after the statute has attached, affords a sufficient answer to the plea, provided the suit has been commenced within six years after the discovery. The question has been twice before this court, and after a full discussion decided in the negative. It would be an idle waste of time to go over the argument."

The court then cites *Troop v. Smith, executors*, and *Leonard v Pitney, supra.*

In *Humbert v. Trinity Church*, 24 Wend., 587, fraudulent concealment was again replied to a plea of the statute, and to that replication, the court, by COWEN, J., say, at page 606:

"But the answer comes again: the complainants are before us for the purpose of enforcing a legal claim. The statute has told us in so many words what alone will save the right of entry or action against the lapse of twenty years. These are infancy, coverture, and other disabilities or impediments expressly named. Still other impediments may have been equally worthy of enumeration; and tha the defendant committed the wrong with a secret and impenetrable design to avail himself of the statute of limitation, and succeeded in covering up his fraud till the time had expired, may have been one of them. But the reasons are obvious, and authorities quite uniform against going beyond the express enumeration in the statute. Among other qualifications sought to be engrafted upon it, *fraud* has been

expressly repudiated by several cases. The question has been before the supreme court in three successive instances. The first was *Troop v. Smith, ex's*, 20 John., 33. The case was decided in 1822. After a full argument, presenting the English and American authorities up to that time, Chief Justice SPENCER went over them, and concluded the unanimous opinion of the court in these words: 'We wish to be understood as deciding the cause on the ground, that whether there was a fraudulent concealment or not, so as to prevent the plaintiff's discovering the fraud until within six years before the commencement of the suit, sitting as a court of law and bound by the express provisions of the statute, we could not notice the fraud so as to take the case out of the statute.' The same point was again resolved by the same court in 1820, *Leonard v. Pitney*, 5 Wend., 30. And still again in 1837, *Allen v. Mills*, 17 id., 202. All these were cases where the injury was committed fraudulently, and kept so veiled that no remedy could be had till the statute had run."

In *Demarest v. Wynkoop*, 3 John. Ch., 129, CHANCELLOR KENT, in his opinion, page 142 *et seq* says: "The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long, and, I believe, uniformly exposed. General words in the statute must receive a general construction; *and if there be no express exception, the court can make none.* It was agreed without contradiction, in *Stowel v. Zouch*, Plowd., 367, that the general provision in the statute of fines would have barred infants, *feme coverts*, and the other persons named in the proviso, equally with persons under no disability, if they had not been named in the exception or saving clause. So, in *Dupleix v. De Roven*, 2 Vern., 540, the lordkeeper thought it very reasonable, that the statute of limitation should not run when the debtor was beyond sea; but there was no saving in the case; he could not resist the plea of the statute. The same doctrine is declared in explicit and expressive terms, by SIR WM. GRANT, in *Beckford v Wade*, 17 Ves., 87, and who refers to the opinion of SIR EARLLY WILMOTS, in Lord *Buckinghamshire v. Drury*, Wilmots' opinions, 177–194, and to the decisions in the common law courts (*Hall v. Wybourn*, 2 Salk., 420; *Aubry v. Fortescue*, 10 Mod., 206), that though the courts of justice be shut by civil war, so that no original could be sued out, yet the statute of limitations continued to run."

In *Sacia v. De Graef*, 1 Cow., 356, to the plea of the

statute was replied the defendant's discharge under the insolvent act, and it was urged, that as the discharge prevented the plaintiff from suing, the case was clearly within the equity of that provision of the statute which prevented its running when there was an incapacity to sue, but the court held otherwise, and by SAVAGE, Ch. J., said:

"The only excuse allowed by the statute, arising from the act of the defendant, is his being out of the state when the cause of action accrued. Though the defendant's virtual protection from prosecution by his discharge, produces the same result as his absence from the state, yet we are not warranted by any rule of construction in deciding, that every cause that produces the same effect as the one mentioned in the act, comes within it. It is true, the reason why the absence of the defendant from the state, excuses the plaintiff from prosecuting, is, that the defendant is beyond the reach of the process of the court; and the defendant's discharge placed him equally out of the reach of a recovery against him, till the decision in the supreme court of the United States in *Sturgis v. Crowinshield*. But it is not for the court to extend the law to all cases coming within the *reason* of it, so long as they are not within the *letter*."

In *Bucklin v. Ford*, 5 Barb., 493, the court say:

"The only question raised upon the argument in this cause was in relation to the statute of limitations. It is undoubtedly a well settled proposition that no exception to the statute of limitations can be claimed, unless it is expressly mentioned in such statute. General words of a statute, it is considered, must receive a general construction, and, unless there can be found in the statute itself, some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment."

The supreme court of Wisconsin, following the above cases, and quoting several of them with approval, has announced and enforced, in several cases, the principle we contend for here.

In *Woodbury v. Shackelford et al.*, 19 Wis., 55, it was held that the particular statute of limitations under consid-

eration, not having expressly excepted infants from its operation, ran against infants the same as against adults. And the court say:

"It is a settled principle in the construction of statutes of limitation, that general words are to have a general operation; and unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. *No exceptions can be claimed in favor of particular persons or cases, unless they are expressly mentioned.*"

In *Lindsay et al. v. Fay*, 28 Wis., 177, the court again apply the rule in construing the statute prescribing a limitation of three years for actions to recover lands forfeited for taxes, "except in cases where the taxes shall actually have been paid." It appeared the land had been redeemed, yet the court held the action was barred. The only exception in the statute was *payment*, and the court could not make another, to wit, redemption. After quoting the above language from *Woodbury vs. Shackelford et al.*, the court say. "Applying these rules to this case, the conclusion seems inevitable, that a redemption of the land is not payment. *To hold otherwise would be to restrain the operation of the statute 'by arbitrary addition,' which the rule of law forbids*"

In *Enckling v. Simmons, Ad., etc*, 28 Wis., 272, the court refused to construe the statute providing "every mortgage of real estate * * may be foreclosed by advertisement," so as to except a mortgage executed by an insane man, and say:

"The proposition, however it may once have been held or considered, that the courts, upon what is termed an equitable construction or otherwise, may, against the plain language of a statute and in opposition to the intent clearly expressed by the words, mitigate the 'violence of the letter' by introducing exceptions where the statute contains none, so as to relieve in cases of hardships or particular inconvenience, *has been too long and too frequently rejected to be now the subject of serious argument or doubt.* Such doctrine, if it ever existed, was long since exploded, and the rule now universally recognized and acted upon is, that whatever else may

be done with the words of a statute, they may never in the language of LORD BACON, 'be taken to a repugnant intent.' * * *This rule has been oftenest applied and is most frequently exemplified, in cases arising under statutes of limitations;* but it is equally applicable to any other statute."

In *Fallass, Ad., etc., v. Pierce et al.*, 30 Wis., 443, the court was urged to restrict the benefit of section 25, chapter 86, revised statutes 1858, (which declares an unrecorded deed void as against a subsequent purchaser in good faith whose deed is first recorded,) to a subsequent purchaser from the same grantor, which the court refused to do, and DIXON, C. J., says, at page 460, referring to the above rule: "I cannot, I must confess, in view of the past decisions of this court upon this rule of construction, and in view of the same, as it has generally been received and acted upon by other courts, hold that the statute in question can be judicially forced — for I can use no other term — so that it shall be limited to a particular class of purchasers only, when by its very words, clear and unambiguous, it applies to all purchases of the kind named in it."

In *Landers v. Burke, et al.*, 33 Wis., 452, chapter 170, laws of 1867, which provided, *in all civil actions*, where no issue had been joined and time therefor had expired, the judge might sign judgment at any term in his circuit, was up for construction, and the court was asked, but refused, to exclude from its operation actions to foreclose mortgages; and the court, at page 463, say:

"We are not aware of the existence of any principle of statutory construction which authorizes us to interpolate an exception, which will exclude from the operation of the act an action to foreclose a mortgage. It is a cardinal rule of interpretation, that general words in a statute must receive a general construction unless there be something in it to restrain them.

In *Sambs, Adm'x, v. Stein et al.*, 53 Wis., 569, the appeal from the judgment had not been taken within two years from the date of the judgment as prescribed by statute, and for this reason:

One month after the date of the judgment, Sambs, the judgment debtor died. No personal representative had been

appointed until a month after the expiration of the two years, but an appeal taken before that time had been dismissed after the two years for want of jurisdiction. Then, the proper substitution was made and the appeal perfected, which was dismissed because not taken within the two years, and the court say:

"It is contended that the time during which the defendants were precluded from taking an appeal by reason of the non-existence of any "adverse party" upon whom to serve the notice of appeal, as required by section 3041, R. S., should not be counted as any part of the two years. Is this contention correct? Did the death of the judgment plaintiff thus stop the running of the statute?"

After citing many cases to the effect that only such exceptions as are specifically mentioned in the statute can be allowed, the court proceed: "We are, therefore, to inquire whether there is any provision of the statute saving and excepting a case like this from the stautory bar above referred to," and it was held there was not and the appeal was, therefore, dismissed.

In *Albright v. Albright et al.*, 70 Wis., 528, the testator had died June 25, 1882; his will was denied probate in the county court, October 31, 1882; the brothers and sisters appealed to the circuit court December 2, 1882, and had given bond by which "all further proceedings in pursuance of the act appealed from," were stayed in the county court pending the appeal. The circuit court admitted the will to probate September 28, 1883, and the record was certified back to the county court, October 16, 1883; and on the 23d of that month the widow filed in the county court her notice of election to take under the statute instead of under the will. The statute under which the election was filed provided that, the widow shall be deemed to have elected to take under the will, "unless within *one year from the death* of her husband she file in the (county) court, notice in writing that she elects to take" under the statute. It was held that the election was filed too late, nothwithstanding all proceedings were stayed in the county court, and the Supreme Court say:

"The election must be made by the widow 'within one year after the death of her husband.' No deduction from the time is provided for in case the validity of the will is contested; *nor even where the will is lost*, and its existence unknown to the widow until after the expiration of the year. The statute may be unwise, if not unjust to the widow, but it is nevertheless imperative upon the courts."

The Supreme Court of Wisconsin cites, with approval, many of the foregoing cases in other courts, and has thus given a settled construction to the statute of limitations of that state accordingly to the effect — 1st. General words in the statute are to have a general operation, and, unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. No exception can be claimed in favor of particular persons or cases, unless they are expressly mentioned. 2d. Fraudulent concealment by the party claiming the protection of the statute, does not interrupt or suspend the running of the statute.

Then, again, the statute of limitations of Wisconsin, as it first appeared in the territorial revision of 1839, and the revision of 1849 (Statutes 1839, p. 260, sec 15; R. S. 1849, chap. 127, sec. 14) was taken from the statutes of New York (2 R. S. N. Y., 1829, p. 295, sec. 18, *et seq.*) with some immaterial changes. Before our adoption of the statute, the courts of New York had placed a settled construction upon it to the effect we here contend for (see N. Y. cases above cited), and when Wisconsin adopted the statute from New York, it adopted with it the construction the New York courts had put upon it.

Swearingen v. Robertson, 39 Wis., 462.
Dropper v. Everson, 22 Wis., 147.
Dutcher v Dutcher, 39 Wis., 651.
McDonald v. Hovey, 110 U. S, 619.

The construction thus placed upon the statute of limitations of the state by the Supreme Court of Wisconsin, will be followed by the Federal courts as the true and proper construction of the statute, under a very well established and familiar rule of those courts.

Green v. Neal, 6 Peters, 291.
Harpending et al. v. Dutch Church, 16 Peters, 455.
Leffengwell v. Warren, 2 Black, 599.
McClung v. Silliman, 3 Peters, 276.
Ross et al. v. Duval et al., 13 Peters, 45.
Bank of Alabama v. Dalton, 9 How., 522.
Wayman et al. v. Southardt, 10 Wheat., 1.
Tioga R. R. Co v. B. & C. R. R. Co., 20 Wall., 137.

3. No improper act is claimed to have been done by defendant before March 1, 1873. The statute (ch. 53, laws 1872) had then already been running for nearly a year on all the causes of action accruing before that date. Those causes of action at least were, therefore, barred by the statute, for it is a well settled principle of construction that where the statute has once commenced to run, no subsequent disability will interrupt or suspend its running.

Angell on Limit., Secs. 196, 477 to 479.
Mercer v. Seldon, 1 How., 37.
Hogan v. Kurtz, 94 U. S., 773.
McDonald v. Hovey, 110 U. S., 619.

In *DeKay e. Durrall*, 2 Green (N. J.), 294, HORNBLOWER, Ch. J., in giving the opinion of the court, declares that the course of decisions, both in England and in this country, has established the rule beyond doubt, that where the statute of limitations has commenced running, it runs over all subsequent disabilities, and intermediate acts and events.

This general rule of construction is made imperative by section 4227, R. S., of Wisconsin, which provides, "No person shall avail himself of a disability, unless it existed when his right of action accrued."

II.

The amendment to the complaint does not show fraudulent conduct on defendant's part.

The general allegation that the city, its officers, etc., fraudulently conspired together to defraud plaintiff and to prevent service of process, can be of no avail to the plaintiff, because it does not set out the facts relied on constituting the fraud. The general allegation of conspiracy, etc., is, therefore, to be deemed eliminated from the complaint so far as this discussion is concerned.

Wood v. Carpenter, 101 U. S., 135.

Nor are the endeavors of plaintiff to get service to be considered, as it is only the fraudulent acts of the defendant that can in any event be considered.

Wells v. Halpin, 59 Mo., 92.

Stevenson v. Robinson, 39 Mich., 160.

We have left, then, simply and only the allegations, (1) That the mayor elected each year since March 1, 1873, duly qualified and immediately placed his resignation in hands of the city clerk, to be filed and to take effect in the case of emergency. (2) That the mayor and aldermen each year since March 1, 1873, failed to qualify until assembled in a secret place, with locked doors, and persons on guard to inform of the approach of any person, and then qualified, transacted certain necessary business for defendant, and immediately resigned. (3) That the common council has failed each year to elect a chairman of the common council.

What, then, is the conduct complained of by plaintiff? Simply that the mayor and aldermen each year qualified, transacted certain necessary business for the city, and then immediately resigned. All this they were specifically authorized by statute to do, and, having done nothing but what

they were authorized by statute to do, they cannot be held to have committed a fraud. Because fraud cannot be predicted of acts authorized by the statute to be done.

At the time the bonds were issued, and, indeed, ever since the city was first chartered, these officers were authorized by law to resign.

(a.) By the common law all officers were authorized to resign, but the resignation did not take effect until it was accepted.

Dillon on Municipal Corporations, Sec. 163 and cases cited.

Page vs. People, 50 Ill., 432.

(b.) By the statutes of Wisconsin in force at the time the city was chartered, and ever since, they were authorized to resign.

Sections 1 and 2, Chap. 2, R. S. 1849.
Sections 1 and 2, Chap. 14, R. S. 1858.
Sections 961 and 962, Revised Statutes 1878.
Section 40, Chap. 45, P. and L. Laws 1853.
Section 7, Chap 327, P. and L. Laws 1856.
Section 7, Chap. 233, G. L. 1865.
Section 2, Chap. 204, P. and L. Laws 1871.

III.

But it is claimed the defendant concealed its mayor each year during the few hours it had one, and that it had no officer known to the plaintiff upon whom summons could be served. To this we reply, the statute provides, under just this state of facts, how the plaintiff shall proceed to prevent the running of the statute.

Section 4240, R. S., provides:

"An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of any provision of law, which limits the time for the commencement of an action when the summons is delivered with the intent that it shall be actually served. * * If a corporation organized under the laws of this state be defendant; to the sheriff or the proper officer of the county in which it was established by law, or where its general business is transacted or where it keeps an office for the transaction of business, or wherein any officer, attorney, agent or other person upon whom the summons may by law be served, resides or has his office; or if such corporation has no such place of business, or any officer or other person upon whom the summons may by law be served, known to the plaintiff, or if such defendant be a non-resident or a non-resident corporation, to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such attempt must be followed by the first publication of the summons, or the service thereof, within sixty days."

The clause, "or if such corporation has no such place of business, or any officer or other person upon whom the summons may by law be served, known to the plaintiff," was inserted in this section, the revisors say: "So as to provide for an attempt to commence an action when a corporation organized under the laws of this state, has no known place of business or officer upon whom the summons can be served."

So that under the existence of the very state of facts claimed of by plaintiff this statute pointed out to him how

he was to proceed to prevent the statute of limitations running against his claim. If defendant concealed its mayor during the few hours it had one each year, and there was no officer known to plaintiff upon whom summons might be served, his mode of procedure was clear. He should have placed his summons in the hands of the marshal with intent to have it actually served, and then followed that up with the first publication of the summons within sixty days, and his action would have been saved. But he neglected to do the only and the very thing pointed out by the statute as necessary to be done in order to save his action, and he cannot now complain that through his own negligence his action is barred. 1 Monnell's Practice, 302.

The statute having provided this one particular method to avoid the statute under these particular facts, must be held to exclude all other methods, under the familiar maxim, *expressio unius est exclusio alterius.*

If, in fact, the defendant concealed its mayor, as claimed, the plaintiff, we submit, could have obtained service of the summons by publication under section 2639, R. S., subdivision 2. But even if that were not so, construing the provisions of that section in connection with section 4240, it is clear we insist that, under the facts as claimed by plaintiff, the only way he could prevent the running of the statute, was for him to deliver the summons to the marshal, with the intent to have it actually served, before the statute had run, and to follow such delivery by the first publication of the summons within sixty days. Having failed to do this the statute bar is complete.

IV.

The statute of Wisconsin has, itself, provided when and to what extent fraud on the part of the party claiming the protection of the statute, shall effect its running. Section 4222, revised statutes, provides that actions must be commenced within six years after the cause of action accrued, and subdivision 7 of that section is as follows:

"An action for relief on the ground of fraud, in a case which was on and before the twenty-eighth day of February, A D one thousand eight hundred and fifty-seven, solely cognizable by the court of chancery. The cause of action in such case is not deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud."

Thus, the statute declares, in substance, that in the one single, isolated case of "an action for relief on the ground of fraud, in a case solely cognizable in a court of chancery," fraud shall have the single specific effect of postponing the accrual of the action, until the discovery of the facts constituting the fraud.

But it is only in that one particular kind of action, to wit, one "for relief on the ground of fraud, solely cognizable in a court of chancery," that even this effect follows fraud. In actions where the jurisdiction of chancery was concurrent with that of law, this section does not apply.

Foot v. Farrington, 41 N. Y., 164.
Carr et al. v. Thompson, 87 N. Y., 160.

The present action is an action at law, and, therefore, this statute cannot apply.

The legislature having thus provided, that fraud should have the particular effect named in the particular action named, has thereby also, in effect, declared that fraud shall have no other effect, and none at all in any action other than the specific one named. Such being the legislative

declaration, it would be a clearly unwarrantable assumption of power, for the court to declare that fraud should have some other effect, and should have such other effect in other kinds of action.

Conroe v. Buell, 7 Wis., 408.
State v. Hastings, 10 Wis., 525.

We submit, therefore, that the bar of the statute is complete, and that the judgment should be affirmed.

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We deem it important to make the Court acquainted with the exact facts which underlie this whole Watertown debt controversy to enable it to determine upon the remedy to be applied.

Chapter 123 of the laws of Wisconsin of 1853 authorized the said city to issue $80,000 of ten-year 8 per cent. semi-annual interest coupon bonds as a loan of its credit to the Milwaukee and Watertown R. R. Co.; and Chapter 127 of the private and local laws of 1856 authorized said city to issue as a loan of its credit to the Chicago, St. Paul & Fond du Lac R. R. Co., $200,000 and to the Watertown and Madison R.R. Co., $200,000 more, of 20 year 8 per cent. semi-annual interest coupon bonds—all of said $480,000, of bonds were by the terms of said acts to be issued only upon a majority vote of the legal voters of said city in their favor. All these bonds were actually issued against the utmost efforts of a large share of its taxpayers, and would now, including principal, interest, and interest upon coupons, judgments, and costs exceed $3,000,000, if no part of it had been paid.

But the record, pages 11 and 12 in Rees vs. City of Watertown, 19 Wal. 107, cited here by both parties, reveals more exactly the real situation. That was an equity case, and the uncontradicted answer verified February 12th, 1872, there says:

"This defendant further answering, admits that said city contains a population of 7,553, inhabitants; that the entire assessment of the personal and real property on said city for the year 1870, was $1,245,625, of which $981,580 was for real, and $264,045 was for personal property; that the entire assessment of real and personal property in and for said city for the year 1871 was $1,097,945.00, of which amount $867,005.00 was for real, and $230,935.00 for personal property, and this defendant denies that the assessment of real and personal property for the said years 1870 and 1871, in and for said city, exceeded, or differed from the sums above stated in this answer."

"This defendant admits that the outstanding bonds of said city amount to $260,000 principal, with interest at the rate of 8 per cent. per annum thereon, secured by interest warrants or coupons to the said bonds attached from the date of said bonds, which makes the indebtedness of said city on said bonds and coupons at the time of verifying this answer $750,000, of which sum $550,000 is already matured and past due."

"This defendant further shows that prior to 1856, the said city had outstanding $80,000 of eight per cent. bonds; that, under said act of 1856, it issued $400,000 more of bonds, and about the same time about $25,000 of what are termed improvement bonds. That the only voting ever done as to issuing the bonds of 1856, was under an ordinance of said city, which afforded no protection against illegal voting; that the voting thereon was largely done by non-residents of said city, consisting of a large force of railroad laborers, then thrown out of employment on the road now running from Wa-

tertown to Portage City."

"That the amount of said bonds was so much in excess of the resources and ability of said city to pay, that they commanded but a small fraction of their par value in the market, and that said complainant probably never gave more than twenty per cent. of the principal of said bonds for the same; that it was originally supposed and provided that the railroads were to pay all of said bonds, but that by foreclosure and sale of the railroads the whole burden of said debt is left upon said city, which it is impossible for it to pay."

"This defendant further shows that it has settled, discharged and procured the discharge and settlement of two hundred and thirty thousand dollars of principal of said bonds and the accrued interest thereon; that it has levied taxes to pay all sums of money necessary to effect such compromise, and is ready to compromise and settle all outstanding bonds and judgments, at as high a rate as can be paid or collected of the people of Watertown."

"This defendant further shows that the only reason why citizens of Watertown have refused in some instances to accept or hold office, is because they would at once be involved in litigation, and harrassed for not doing what could not be accomplished."

It is now over 17 years since said answer was verified and said facts laid before the court. Hence the past due principal and interest of said debt, with its interest-bearing coupons now exceeds the assessed value of all real and personal property of the citizens of said city. The amounts since paid are what remained of said improvement bonds, and some $42,000 of compromise R. R. bonds under Chapt. 72 of the P. and L. Laws of 1870, nearly all issued prior to said 12th of Feby. 1872, soon after which, all plans of further settlements were broken up, by the persistant refusal of nearly all the rest of the bondholders to accept the

city's offer of compromise, or to name any terms of settlement short of principal, interest and costs.

The said debt, being all now due, it all equally demands immediate payment. Suppose we say we will pay and proceed to assess, levy and collect the whole amount. The first effect would be, that before we could get ready to make the assessment all personal property would fly from the sweeping confiscation beyond the reach of the assessor or tax gatherer. The back of all industry would be broken, and the tax then to be levied on the real estate would be equal to the highest price at which it could ever have been sold. In other words it would all be so incumbered with this tax levy, as to be utterly worthless in the hands of its present owners or of any purchasers, especially so, as all industries would be annihilated. If some of the more fortunate ones could pay, they would be at once swamped by the inability to pay, of widows, orphans, the unfortunate, and especially of that large class of small property holders whose modest homesteads are the slow accumulation of a lifetime, and who cannot repurchase them. And this tax levy coming again and again, there is no wealth at Watertown, which it would not readily exhaust. In the presence of this debt the citizens of Watertown are helpless. It but illustrates a correct maxim of finance, that no municipal debt is worth more than what a reasonable tax will pay, because excessive taxation, destroys the very basis of all taxation.

Plaintiffs in Error seem to intimate in their brief, that there is something wrong, or that it is a fraud on the part of the city, for its mayor to resign.

But they must take their stand upon one of these two propositions.

1st. That such resignations are legal, and proper, and as free from all fraud as it is for their counsel to stand here and argue their case.

Or, 2nd. That the resignation is an actual attempted fraud on Plaintiffs in error, and therefore illegal and void.

If the former be their position, then the bondholders have nothing to complain of. It was a risk they took, when for a trifle they bought bonds issued so much beyond the ability of the city or its people to pay, that they well knew that somebody would have to be fearfully oppressed, wronged, and robbed, before they could get their money.

But if the latter be their position, they certainly have no ground of complaint. For the attempted resignation being wrong, illegal and void, they had only to serve their summons the same as if no resignation had ever been attempted If this be the correct view, it would put an end to all of these five cases involving the statute of limitations, by an affirmance in every case of the judgment of the court below.

But the Revised Statutes of Wisconsin of 1849 (in force when these bonds were issued in 1853 and 1856), subdivision 4 of Sec. 1 of chap. 11, authorizes the mayor to resign to the officers authorized to order a new election, and subdivision 2 of Sec. 2 of same Chap. vacates his office at once upon his resignation. Said city's charter of 1856, (Chap. 327, Sec. 6 P. and L. Laws of 1856) provided that "all elective officers, except Justices of the Peace and aldermen, shall, *unless otherwise provided*, hold their respective offices for one year and until their successors are elected and qualified." Now as it was then otherwise provided as above, in effect, by the general statute, that the office of mayor should become vacant, ipso facto, upon filing his resignation, there has been no material change of the charter in this respect. Hence Plaintiffs when they took the bonds in suit, took upon themselves the risk of citizens, voluntarily, taking and holding the offices.

This identical question was before this court in

Rees vs. The city of Watertown 19 Wal. 107, and was the great burden of the complaint, sought there to be overcome by the equity powers of this court. It was not the object of the law to have the mayor's office vacant, but to induce its acceptance, ample provision being made to fill vacancies. This court there recognized the validity of these laws and said. "The remedy in law is adequate and perfect. The difficulty is in its execution only."

In considering this case of such serious import to said city and to its citizens, there is another proposition which demands attention. In Rees vs. The City of Watertown supra, and also in the unreported case of Hewett et. al. vs. the same, the question came directly before this court whether the citizens of Watertown owed this debt, and this court in both cases most emphatically held that they did not. Hence it is the debt solely of the legal entity known as the city of Watertown, consisting of its powers of government and to levy taxes through its citizens volunteering to accept, retain and execute the offices for that purpose. Hence there is no obligation, moral or legal upon any citizen who never consented to this debt to do anything by which he or his fellow citizens shall owe or have to pay any part of it, especially in view of its destructive magnitude and villianous origin.

In 1874 the people of Wisconsin adopted an amendment to article XI of their constitution, which prohibits the contraction of municipal debts, beyond five per cent. of the assessed value of the property within the municipality. This now shields the citizens of our state from further wholesale municipal robbery. But still the pitiless storm beats on Watertown, from which its people's only shelter is the decision of this court in Rees vs. The City of Watertown, supra.

With the foregoing explanations we proceed to

argue Nos. 197 and 201 of these cases, which in all essentials, are alike.

I.

The summons in this action ~~just~~ first issued out of the court below to the U. S. Marshal on the 19th day of June A. D. 1883, Fol. 3 of printed record. This was almost six months after the six years statute of limitations had run upon the last maturing causes of action sued on, and set out in the complaint. The answer or plea of the statute of limitations, found at Fol. 10 and also printed in full at the end of this brief, avers "that neither the said action nor any of the causes of action in the said amended complaint stated nor any part thereof accrued within six years before the commencement of the said above entitled action, nor within six years before said 19th day of June, 1883. That said action was not commenced, *nor attempted to be commenced before said 19th day of June, 1883*," thus not only interposing the bar of the statute, but negativing all pretended diligence on the part of Plaintiffs to commence the action sooner. All this Plffs'. general demurrer admits to be true. Fol. 10, page 9. But there is no averment of any effort to obtain service before the six years bar of the statute had taken full effect. The allegation, that since the 1st day of March, 1883, they have employed agents and attorneys for the purpose of ascertaining who was the mayor, &c., (last of Fol. 7) is no averment that this was done before the 19th day of June, 1883. But what did these agents and attorneys ever do?

The last paragraph of the amendment, Fol. 8, is a fine example of vagueness in pleading, when the pleader has very little basis for what he has to say. It is the fair inference that the diligence and employment of agents and attorneys relate to about the 19th of June, 1883, for how could they do anything to get the process served on said city before it had ever been issued. Very soon after the attempted

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service the defendant appeared and answered. Folio 3. What right has Plaintiff to claim that he has been diligent to have the Court get jurisdiction of Defendant before he has procured the issue of a summons, so that he may have a chance to get service, or allow Defendant to voluntarily appear, as it did in this case very soon after the attempt to serve was actually made.

II.

But Plaintiffs allege that *fraud* defeated the service of the process which had never issued until some six months after the action was barred as aforesaid. There is no law requiring any person to accept or retain the office of mayor, and the right to resign we have shown above. Neither is there any law requiring the common council to meet openly, nor to give Plaintiffs or the public at large notice of their meeting; and there is no averment that the place and time of the meeting was not known to many persons. Every act of the officers and citizens complained of was legal. This debt is a matter of vital public interest at Watertown, and the conspiracy charged, is but the exercise of the constitutional right (Sec. 4 of the 1st article of the constitution of Wis.) of every citizen of said city to peaceably assemble and discuss the subject of this debt, which he don't owe, and devise measures by which he shall not owe it, and by which it shall not harm him or the public interests, and denounce the dishonesty by which it was fastened on the city. Besides if any citizen of Watertown has done Plaintiffs any wrong, or defrauded them of any right, they have their redress, by action against him, for the injury. That no real conspiracy is alleged, the definition of what it takes to constitute a conspiracy plainly shows. For "a conspiracy is a combination of two or more persons to accomplish, by a concerted action, some criminal purpose, or to accomplish

some purpose not in itself criminal, by unlawful or criminal means."

The corporation having no property of its own is incapable of any such conspiracy, and its citizens in public and private have the right to take such measures for their own and the public safety as the exigency may demand, and transact the "certain necessary business," complained of in these amendments to the complaint. Fol. 7, page 7.

III.

Case No. 199 is practically like said Nos. 197 and 201, as to first legal attempt at service not being made until the 19th day of June, 1883, some six months after the bar of the statute was complete on every cause of action stated in the complaint. The summons in the name of the deceased Elijah W. Carpenter and the living Edwin F. Knowlton, bears the date of January 9th 1878, Fol. 6. But no effort appears to have been made to serve it until Dec. 23rd, 1882, nearly five years afterwards, Fol. 7, and then said Carpenter had been dead nearly a year and four months, he having died Sept. 1st, 1881. Fol. 8. And this whole proceeding was a nullity. (Fol. 8, at the bottom of page 4). And even Plaintiffs' attorneys do not appear to have been informed of his decease until about the time, June 19th, 1883, when they untertook to revive the suit which had never existed. Fols. 8, 9 and 10. Hence we say that the first legal attempt to commence the suit did not precede the last named date. It well illustrates Plaintiffs and their attorneys want of diligence, and why they now seek to depend on mere hearsay, that Plaintiffs attorneys do not appear to have known anything of Carpenter's decease for well nigh two years after it occurred. We think this No. 199 is substantially in the same situation as said Nos. 197 and 201, no real attempt having been made to

commence it before the 19th day of June, 1883, nearly six months after the bar of the statute had taken full effect.

IV.

About all of the foregoing reasoning we think, applies equally to cases numbered 198 and 200. But in addition thereto, in these two cases, the Plaintiffs had ample opportunity to have commenced their action, independent of all they complain of in their amendments to their complaints, all modeled upon the same plan in every one of the five cases. This more distinctly appears from our briefs in the last two mentioned cases.

V.

But Plaintiffs in error, state, or assume on pages 11, 24 and 34 of their brief, that Defendant's answer or pleas of the statute of limitations, admit each and every allegation of their amendments to their complaints, although in other parts of every one of Defendant's answers, each and every allegation of the said amendments, intended to take their cases out of the statute of limitations, is traversed and denied, except the single averment of the annual election of a mayor for said city. This is a three-fold mistake, and the fundamental error upon which they have staked everything in all these five cases.

Under the practice which preceded the code, Plff's could reply, to the plea of the statute of limitations, anything that would take their case out of the bar of the statute, and Defendant could take issue on the reply by rejoinder. This formed a separate and distinct issue to be tried. Wood on limitation, Sec. 7.

3d. Chetty's Pleadings, 1160 and 1220 to 1225.

The sole question here is as to the sufficiency of the plea of the statute of limitations, Plaintiffs' demurrer admitting all its averments to be true.

The rule of the law is, that the plea of the statute in the words of the statute, or in equivalent words, as here, is sufficient, and puts the Plaintiffs to their proofs. By so pleading, in the language of the court, in the People vs. Arnold, 4th N. Y., 508, at pages 511-12, "the words of the plea cover just as much ground in the answer as they do in the statute. They mean the same thing in both places. The defendant has pleaded the fact on which, by law, the bar of the statute depends, instead of pleading the evidence of the fact, and until good pleading shall be made unlawful the answer must be held sufficient."

2. Greenleaf's Evidence Sec. 431.

The code pleading of Wis. is borrowed mainly from the equity system, which permitted a Deft. to plead to one portion of a complaint and demur to another, and answer to a third part. 1st Barber's Chancery Practice 117. The code pleading if possible is still more flexible, allowing as many different defenses as a Defendant may have, and even, of inconsistent defenses.

To illustrate our position, suppose Plff's. instead of the allegations of their amendments, had averred in their place that an actual state of war had closed the courts thereby prevented the commencement of these five actions, and in analogy to the former practice, Deft. had stood by its pleas of the statute of limitations, and had also put in issue the allegations of the existence of war, demurrers to the pleas of the statute would be overruled of course, and if the cases were to be sent back from here, it would not be with directions to enter judgment for Plff's, but at most to try the issue on the new matter on distinct and separate issues on said amendments. Wis. system of special verdicts, Secs. 2857-8, R. S., would be well adapted to such trials. But as in the cases at bar the actual new matter therein set up, fully answered and denied, is

not, as we think, for the reasons stated, well pleaded, we believe no such result of being given can follow. But certain it is that the plea of the statute of limitations has not turned Deft's. most emphatic denials of the averments of the amendments to the complaints into an admission of their truth.

DANIEL HALL,
GEO. W. BIRD,
Attorneys for Deft. in Error.

NO. 197.

U. S. SUPREME COURT,

HENRY AMY & GUSTAVUS HOPPENSTEDT,
Plaintiffs in Error,

vs.

THE CITY OF WATERTOWN,
Defendant in Error.

The following copy of the plea of the statute of limitations is made in this case to call special attention to the part in italics under the demurrer to it. Fol. 10 of record.

"Fifth. And this, the said defendant, for a further and separate defense, which it will insist upon to said action and to the whole thereof, and to each and every cause of action set forth in said amended complaint, avers and alleges that neither the said action nor any of the causes of action in the said amended complaint stated nor any part thereof *accrued within six years before the commencement of the said above-entitled action, nor within six years before said 19th day of June, A. D. 1883, and that said action was not commenced nor attempted to be commenced before said 19th day of June,* 1883, and that the said action was not commenced within the six years limited by law for the commencement thereof after the same accrued, and is barred by the statute of limitation of the State of Wisconsin; that as to all the bonds, interest warrants and coupons described in said amended complaint, and as to each and every one of said bonds, interest warrants and coupons, the said defendant saith and avers that each and all of said several causes of action in said amended complaint stated, did not, nor did any or either of them, accrue thereon within the six years next before the commencement of said action, and that the said action, and the whole and each and every part thereof, is barred by the statute of limitation of the State of Wisconsin.

GEO. W. BIRD AND DANIEL HALL,
Defendant's Attorneys.

not, as we think, for the reasons stated, well pleaded, we believe no such result of being set back can follow. But certain it is that the plea of the statute of limitations has not turned Deft's. most emphatic denials of the averments of the amendments to the complaints into an admission of their truth.

DANIEL HALL,
GEO. W. BIRD,
Attorneys for Deft. in Error.

NO. 197.

U. S. SUPREME COURT,
HENRY AMY & GUSTAVUS HOPPENSTEDT,
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GEO. W. BIRD AND DANIEL HALL,
Defendant's Attorneys.

2. 33. EXHIBIT No. 1 TO ORIGINAL BILL. Filed March 17, 1883.

Assessment of the Cost of Paving, Grading, Curbing, Guttering, &c., in Front of 180, *Sundry Property in the First Ward* Ward *of the City of Washington, as per Certificate Herewith Annexed.*

To whom assessed.	No. of square.	No. of lot.	Paving. Square yards.	Paving, per yard.	Paving. Amount.	Grading. Cubic yard.	Grading, per yard.	Grading. Amount.	Curbing. Running feet.	Curbing, per foot.	Curbing. Amount.	Gutters. Cobble-Stone, yards.	Per yard.	Gutters. Amount.	Gutter-Stone, running feet.	Per foot.	Gutters. Amount.	First instalment.	Paid	Second instalment.	Paid.	Third instalment.	Paid.	Fourth instalment.	Paid.	Total amount.	Date of law.	Contractor or parties doing work.
Mark Young	180	S. 1	146½	87	$127 31	256	20	$51 20	110	87	$95 70	40	03	$25 50	120	40	$44 00									$343 41		H. Birch.
Nicholas Eckhardt	"	" 2	17½	"	15 22	47	"	9 40	18½	"	16 09	6	"	3 78	18½	"	7 40									51 89		
A. D. Shoemaker	"	" 3	18	"	16 53	19	"	3 80	20½	"	17 69	6	"	3 78	20½	"	8 13									49 93		
Do. do.	"	" 4	18	"	16 53	19	"	3 80	20½	"	17 69	6	"	3 78	20½	"	8 13									49 93		
Pierce Shoemaker	"	" 5	18	"	16 53	19	"	3 80	20½	"	17 69	6	"	3 78	20½	"	8 13									49 93		
A. Shoemaker	"	" 6	18	"	16 53	19	"	3 80	20½	"	17 69	6	"	3 78	20½	"	8 13									49 93		
H. Hart	"	" 7	27	"	23 49	25	"	5 00	20½	"	17 69	6	"	3 78	20½	"	8 13	14 52	M. F. K. Nov. 29, '70							58 09		
H. Hart	"	of 8	1½	"	1 30	2	"	40	1½	"	1 45	½	"	0 31	1.8	"	0 66	1 03	M. F. K. Nov. 29, '70							4 12		
Jared Meade	"	of 8	17½	"	15 08	22	"	4 40	18½	"	15 95	6	"	3 78	18½	"	7 33									46 54		
A. Lepreux	"	S. 9	19	"	16 53	22	"	4 40	20½	"	17 69	6½	"	4 20	20½	"	8 13									50 95		
A. Tait	"	S. 10	19	"	16 53	22	"	4 40	20½	"	17 69	6½	"	4 20	20½	"	8 13	12 74	(P'd Jan'y 13, 1871 (Dec. 15, '70							50 95		
J. F. Wineberger	"	S. 11	19	"	16 53	22	"	4 40	20½	"	17 69	6½	"	4 20	20½	"	8 13									50 95		
J. A. Wineberger	"	S. 12	19	"	16 53	22	"	4 40	20½	"	17 69	6½	"	4 20	20½	"	8 13									50 95		
M. Seeley	151	S. 7, 8	57½	87	49 80	38	20	7 60	43	87	37 41	14½	03	7 24	43	40	17 20									119 25		
—— Sterlin		S. 5, 6	58½	"	50 54	38	"	7 60	44	"	38 28	14½	"	7 24	44	40	17 60									121 26		
Thomas Young	156	1 to 12, inclusive.	679	"	590 73	1,702	"	340 40	760	"	661 20	252½	"	158 97	757	40	302 80									2,054 10		Entered Nov. 17, 1870. This work was done at this date, but, by request of the owner, not entered until Nov. —, 1871. WM. FORSYTH, *S'c'yer D. C.*

Approved Nov. 16, 1870.

M. G. E[illegible]RY, *Mayor.*
WM. FO[illegible]SYTH,
Sup't of Streets.
HIRAM BROWN,
Commissioner.
D. M. DAVIS,
ROBERT ARMOUR,
Ass't Commissioners.

Stock Issued January 13, 1871.

1st inst., from 2204 to 2304, inclusive.
2d " " 2883 " 2896 "
3d " " 2932 " 2945 "
4 " " 2961 " 2974 "

JOHN E. CLARK.

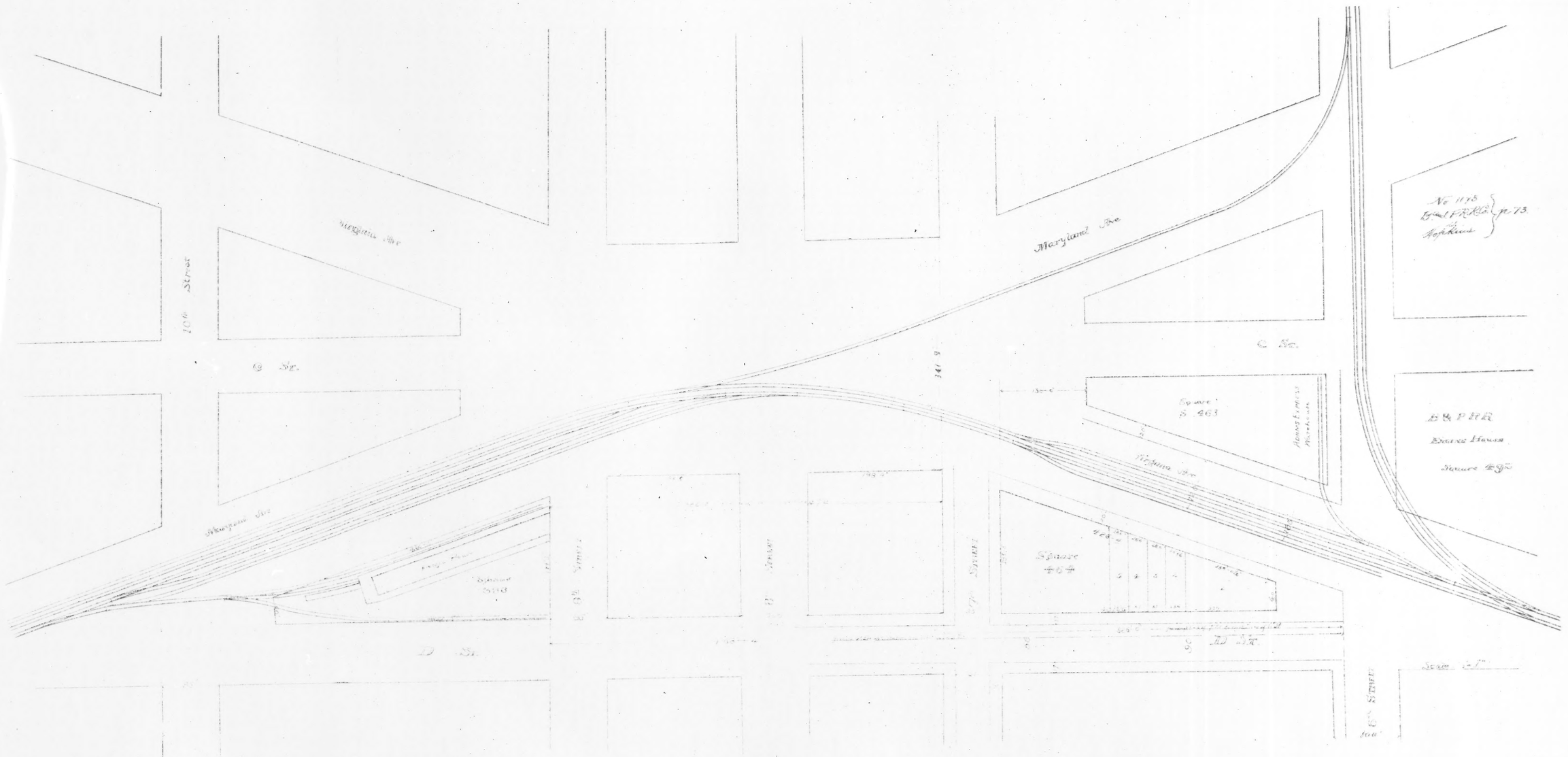
Stock Issued to Henry Birch.

1st inst., 819; 2d inst., 914; 3d inst., 926; 4th inst., 928.
March 9, 72.

JOHN E. CLARK.

A true copy of original on file in this office, the entry for square 156 being made in red ink by request.
March 16, 1883.

WM. OSCAR ROOME,
Chief of Sp'l Ass't Division.


10th Street
Maryland Ave
Square 463
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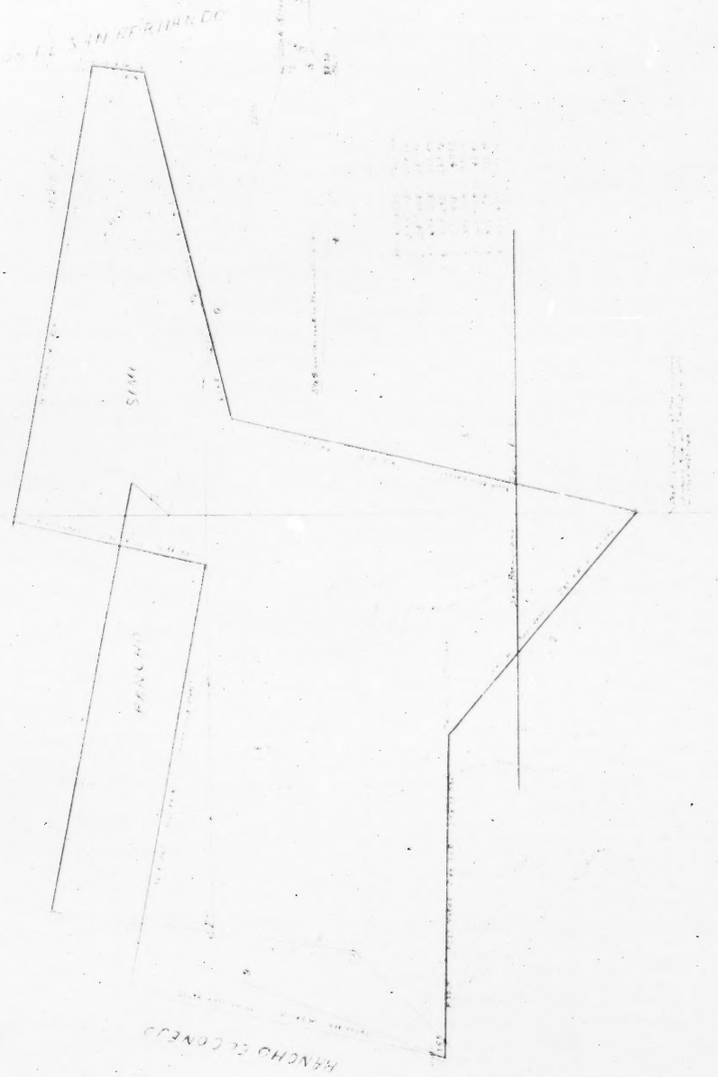
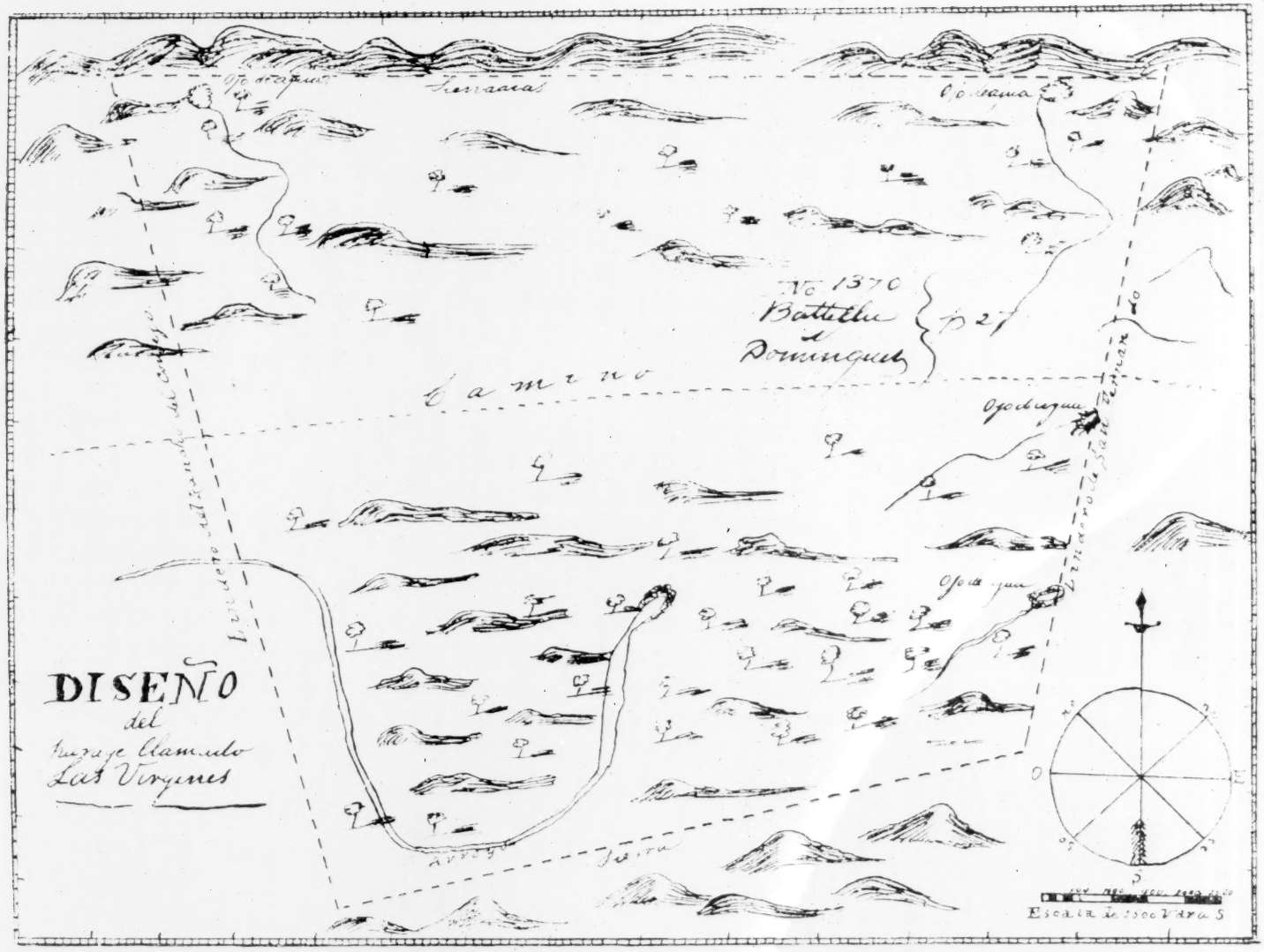
No 1310
Pueblo
Solicitor

1896




DISEÑO
del
Puerto de Ramudo
Las Virgenes
No 1370
Batallon
Dominguez
p 27
Escala de 1500 Varas